

No. 13138

United States
Court of Appeals
for the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,
vs.

PAT DUBY, Doing Business as Pat Duby Company and CONTINENTAL CASUALTY COMPANY, a Corporation,

Appellees.

Transcript of Record

Appeal from the United States District Court,
Western District of Washington
Northern Division.

FILED.

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Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

PAUL P. O'BRIEN
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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United States District Court, Western District of
Washington, Northern Division
No. 2211

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PAT DUBY, Doing Business as PAT DUBY
COMPANY, and CONTINENTAL CAS-
UALTY COMPANY, a Corporation,

Defendants.

COMPLAINT

Plaintiff respectfully alleges and shows to the
Court:

I.

That jurisdiction of this action is conferred upon
this Court by Sec. 1345, Title 28, U. S. Code.

II.

That the United States of America is now and
at all times mentioned herein has been a corpora-
tion sovereign and in such capacity brings this suit.

III.

That the Department of Commerce is a depart-
ment of the Federal Government in charge of Civil
Aeronautics Administration.

IV.

That Pat Duby, at all of the times hereinafter
mentioned was a sole trader doing business under
the style of Pat Duby Company, and Continental
Casualty Company is a corporation, organized and
existing under and by virtue of the laws of the

State of Indiana, duly authorized as surety under Government contracts.

V.

That on or about the 7th day of September, 1944, the plaintiff, by and through the Department of Commerce, Civil Aeronautics Administration, by Proposal No. 7-45-109, called for bids for the construction of four concrete check dams, and one twin-barrel concrete box culvert at the Seattle-Tacoma Airport, Seattle, Washington, and thereafter defendant Pat Duby bid the sum of \$6,602.70 for the job, said bid being the lowest and best bid received therefor, which said bid was accepted.

VI.

That thereafter and on, to wit, the 4th day of October, 1944, a formal written contract was entered into between the parties, the same being negotiated Contract No. C7ca1454, by the terms of which defendant Pat Duby agreed to perform the said work of constructing four concrete check dams and one twin-barrel concrete box culvert for plaintiff at the Seattle-Tacoma Airport, Seattle, Washington, for the total sum of \$6,602.70, said work to commence within five calendar days after date of notice to proceed, to be completed within thirty calendar days from that date, which time was subsequently extended an additional sixteen days.

VII.

That by the terms of Proposal No. 7-45-109 and particularly paragraph "H" thereof, is the following:

“Liquidated Damages. Subject to the provisions of Article 9 of the contract, the contractor shall be charged liquidated damages for each day of delay in completion of the schedule, as follows:

“Schedule 1—\$20.00 per calendar day.”

VIII.

That instead of completing said contract in the allotted forty-six days provided in said contract and extensions thereof, Defendant Pat Duby consumed a total of one hundred seventy-nine days, or one hundred thirty-three days in excess of the time limited for the completion of said work, and by reason of said delay and under the terms of said Proposal No. 7-45-109 and paragraph 9 of said contract, Defendant Pat Duby and his surety, Continental Casualty Company, became indebted to plaintiff in the sum of \$2,660.00, demand for the payment of which has been made and refused and by reason thereof defendants are indebted to plaintiff in the sum of Two Thousand Six Hundred and Sixty Dollars (\$2,660.00).

Wherefore, plaintiff prays for judgment against defendants in the sum of \$2,660.00, together with its costs and disbursements herein expended.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ JOHN E. BELCHER,
Assistant U. S. Attorney.

[Endorsed]: Filed March 15, 1949.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT,
CONTINENTAL CASUALTY COMPANY

Comes now the defendant, Continental Casualty Company, and for answer to the complaint of the United States of America, admits, denies and alleges as follows, to wit:

I.

Admits Paragraphs I, II, III and IV of said complaint.

II.

Answering Paragraphs V, VI, VII and VIII, this answering defendant states that the whereabouts of the defendant, Pat Duby, is unknown to this defendant; that this defendant was never supplied with a copy of said contract referred to in plaintiff's complaint or the specifications thereof or Proposal No. 7-45-109 or any information, data or documents relative thereto and consequently is unable to state whether or not the allegations contained in Paragraphs V, VI, VII and VIII of plaintiff's complaint are true or false and, therefore, upon information and belief deny the same and each and every part thereof and particularly deny that the plaintiff has occasioned any loss or damage due to said delay, if any, and particularly denies that the defendant, Continental Casualty Company, is indebted to the plaintiff in the sum of \$2,660.00, or any other sum whatsoever, or at all.

By Way of Further Answer and as a First Affirmative Defense, this defendant is informed and believes and, therefore alleges on information and belief as follows, to wit:

I.

That the defendant, Pat Duby, was awarded a contract by the United States of America to construct at the Seattle-Tacoma Airport at Seattle, Washington, four concrete check dams and one twin-barrel concrete box culvert for a total estimated price of \$7,562.70. That neither the plaintiff nor the defendant, Pat Duby, knew the special circumstances and conditions existing underneath the ground at said time or place. That thereafter when the defendant, Pat Duby, commenced construction of said work it was found that a large body of quicksand existed under the surface crust, thereby making the defendant, Duby's, work exceedingly difficult and imposed upon him a hardship and considerably increased cost and expense in coping with said quicksand. That by virtue thereof there was no meeting of minds in the awarding and accepting of said contract. That nevertheless and despite the additional hardship, cost and expense the defendant, Duby, finished and completed said contract in accordance with the plans and specifications thereof.

II.

That because of said quicksand condition and the difficulty encountered, the performance of said work required additional time. That the plaintiff granted

to the defendant, Duby, an extension of 16 days but such extension was inadequate and not sufficient and that thereafter all further or additional requests by the defendant, Duby, for extension of time were arbitrarily denied and refused despite the unforeseen circumstances and difficulties encountered.

III.

That plaintiff has computed as the penalty under said contract for delay in the completing of said job the amount of \$2,660.00 and withheld from the final payment owing to the defendant, Duby, the sum of \$979.82 in reduction of said claimed penalty or forfeiture of \$2,660.00.

IV.

That as the direct result of performing and completing said job, the defendant, Pat Duby, became insolvent and filed petition for adjudication in bankruptcy in this court, the same being File No. 37366, on June 28, 1944, and was thereafter adjudicated as a bankrupt on June 30, 1945, and discharge thereafter granted on November 14, 1945. That this defendant, Continental Casualty Company, did pay into the registry of the court for the satisfaction of the claims of labor and material men on said job the full amount of its payment bond in the amount of \$3,285.35 and that the United States Government in connection with said contract has received work, labor and material of the value far in excess of the contract awarded to defendant, Pat Duby, and that it is inequitable, unjust and unfair that said United

States Government apply or attempt to apply at this time the penalty or forfeiture of \$20.00 per day claimed for the delay in the completion of said job. That said complaint alleges or sets forth no damage of any kind as a result of said delay.

By Way of Further Answer and as a Second Affirmative Defense, this defendant is informed and believes and, therefore alleges on information and belief as follows, to wit:

I.

That this defendant, Continental Casualty Company, was never notified by the plaintiff or given any notice of any kind or character as to the default or alleged default or delay in performance by the said defendant, Duby, or of any claim made or contemplated to be made against this defendant for liquidated damages as a result of the delay in completion of said contract by the defendant, Duby. That by reason of the failure of the United States of America to notify this defendant of its claim or proposed claim, this defendant was unable to and therefore did not file a contingent claim in the bankruptcy proceedings of the defendant, Duby, and thereby lost its right and privilege of claiming a priority therein by subrogation to the government's sovereign right which would have given it the preference of all claims except wages. That because of the delay in notifying this answering defendant of such claim or intended claim, the

plaintiff is now estopped from making such claim and is guilty of laches.

By Way of Further Answer and as a Third Affirmative Defense, this defendant is informed and believes and, therefore alleges on information and belief as follows, to wit:

I.

That the said plaintiff, United States of America, did not in any manner notify the defendant, Continental Casualty Company, as surety for the defendant, Pat Duby, of any default by the said Duby in the performance of said contract or of any delay in the performance thereof, nor did the said plaintiff cancel or attempt to cancel said contract of defendant, Duby, thereby giving the opportunity to this answering defendant to minimize the damage or to itself perform the said contract. That all the while the United States Government was claiming a breach of contract by the defendant, Duby, and without notifying this answering defendant, as surety of the defendant, Duby, of such breach or delay, the said plaintiff continued after the alleged breach to make progress payments to the defendant, Duby, of moneys earned under the contract, all to the great prejudice and damage of this answering defendant; that the plaintiff should have impounded and withheld all progress payments immediately following the date set for completion of the construction contracted for.

By Way of Further Answer and as a Cross-Complaint Against the defendant, Pat Duby, the defendant, Continental Casualty Company, complains and alleges as follows, to wit:

I.

This cross-complaining defendant, Continental Casualty Company realleges and makes a part hereof as though fully set forth at length herein Paragraphs I, II, III, and IV of plaintiff's complaint together with this answering defendant's First, Second and Third Affirmative Defenses herein.

II.

That plaintiff herein complains and alleges that defendant, Pat Duby, breached the contract which was awarded to him by the plaintiff for the construction at Seattle-Tacoma Airport at Seattle, Washington, of four concrete check dams and one twin-barrel concrete box culvert in that said Duby did not complete said contract within the time allowed by said contract and is claiming a penalty and forfeiture for such delay.

III.

That in connection with the issuance of the defendant, Continental Casualty Company's surety bond in connection with said contract in the amount of \$3,280.35 and for a part of the consideration for the issuance thereof defendant, Pat Duby, did execute and file an application directed to Continental Casualty Company for the purpose of securing such

bond. That among other things said application for bond contains the following words and phrases, to wit:

“Second. To indemnify the company against all loss, costs, damages, expenses and attorney’s fees whatever and any and all liability therefor sustained or incurred by the company by reason of executing said bond or bonds or any of them; in making any investigation on account thereof; in prosecuting or defending any action brought in connection therewith; in obtaining release therefrom, and in enforcing any of the agreements herein contained.”

IV.

That in the event of plaintiff in this case recovering judgment against defendant, Continental Casualty Company, as prayed for in its complaint, or otherwise, then under said bond application and said bond, the Defendant Continental Casualty Company is entitled to and hereby demands judgment in an equal amount, plus costs and attorneys’ fees, against Pat Duby, doing business as Pat Duby Company.

Wherefore, having fully answered plaintiff’s complaint, this answering defendant, Continental Casualty Company, prays that said complaint be dismissed and held for naught and further demands that in the event that judgment is rendered in favor of plaintiff against defendant, Continental Casualty Company, that said defendant, Continental Casualty Company, have and recover judgment in an equal

amount, plus its costs and disbursements and a reasonable attorneys' fee against the defendant, Pat Duby.

/s/ WILLARD E. SKEEL,
Attorney for Defendant,
Continental Casualty Co.

Receipt of Copy acknowledged.

[Endorsed]: Filed July 12, 1950.

[Title of District Court and Cause.]

**ANSWER AND AFFIRMATIVE DEFENSES
OF PAT DUBY, DEFENDANT HEREIN**

Comes now the Defendant, Pat Duby, doing business as Pat Duby Company, and by way of Answer herein, admits, alleges and denies in the form and manner as follows, to wit:

I.

This answering defendant admits the allegations contained in Paragraphs I, II, III and IV of the plaintiff's complaint.

II.

Answering Paragraphs V and VI of the complaint herein, this defendant admits the execution of the contract mentioned in said paragraphs, provided, however, that this defendant is not presently fully familiar with the exact figure named in said contract, and this defendant does not presently have the information with regard thereto available to him.

III.

Answering Paragraph VII of the complaint herein, this answering defendant admits the same.

IV.

Answering Paragraph VIII of the complaint, this defendant admits that there was delay in the completion of the said contract and particularly alleges that any delay in the completion of said contract was not due to any fault on the part of the answering defendant; and further answering said Paragraph VIII, this defendant denies the same and each and every part thereof not herein expressly admitted, and particularly denies that he is indebted to said plaintiff in the sum of \$2,660.00 as alleged in said complaint or in any other sum.

Further answering said complaint and by way of First Affirmative Defense herein, this defendant alleges:

I.

That the substance and gist of the contract mentioned in the plaintiff's complaint had to do with excavation and other work below the surface of the ground where the work was to be carried on; that at the time of the making of the estimate as to the nature of the work to be performed and the cost thereof, the plaintiff estimated and represented to this defendant that the conditions incident to the work involved were normal conditions; that this defendant entered his bid to do the said work upon the representation of the plaintiff that the conditions incident to said work were normal, and this

defendant made his bid based upon the mutual understanding as between plaintiff and defendant that the conditions surrounding the said work and operation would be normal in character.

II.

That when and as the defendant entered upon and undertook the performance of said contract and it was found that the conditions beneath the surface of the ground were such that work could not be carried on normally, that the under surface was of such a condition that great additional expense was involved, that upon learning of the said adverse conditions, this defendant negotiated with the representatives of the plaintiff through the Civil Aeronautics Authority and the representatives of said Civil Aeronautics Authority represented to this defendant that an adjustment would be made as to the amount to be received for the said work and represented to the defendant that the plaintiff would pay such additional amount as would be necessary to cover the unanticipated costs.

III.

This defendant alleges upon information and belief that the local representative of the Civil Aeronautics Authority represented to this defendant that the question of an adjustment would be formally submitted to the proper authorities representing the plaintiff and that action would be taken thereon; that this defendant, relying upon said assurances by the representative of the plaintiff, continued to cause to be carried on the work involved.

IV.

That notwithstanding said arrangements for an adjustment, no adjustment has ever been made to the knowledge of this defendant.

V.

This defendant further alleges that he and his sureties on the bond filed by the Continental Casualty Company, a corporation, at a very great additional expense, completed the work, and that the reasonable cost of the work contemplated by said contract was and is, to wit, the sum of Twelve Thousand Dollars (\$12,000.00), and that the plaintiff herein has never paid out and expended any greater sum on account of the said work than, to wit, the sum of Five Thousand Seven Hundred Twenty-three and 92/100 Dollars (\$5,723.92).

VI.

This defendant further alleges that the plaintiff herein has never paid the full agreed contract price stated in the original contract, and that the plaintiff has in fact wrongfully withheld the sum of Nine Hundred Seventy-nine and 8/100 Dollars (\$979.08) from the amount stipulated in the said contract as the contract price.

VII.

That by reason of the matters and things herein alleged, the plaintiff herein has been wrongfully enriched in the sum of Nine Hundred Seventy-nine and 8/100 Dollars (\$979.08) withheld from the original contract price and wrongfully converted by

the plaintiff, and has been further unjustly enriched by reason of the matters and things as herein alleged in the difference between, to wit, Twelve Thousand Dollars (\$12,000.00) and Six Thousand Two Hundred Two and 70/100 Dollars (\$6,202.70).

VIII.

That any effort on the part of the plaintiff to recover any further or additional sums by reason of the execution of said contract and by reason of the terms thereof is inequitable and unconscionable and is wholly unjustified and cannot in good conscience be allowed.

IX.

This defendant further alleges that if plaintiff has been damaged by reason of any matters and things alleged and covered by the pleadings herein, that said damage is technical only and that said damage, if any, is within the rule of "Damage Absque Injuria."

For a second and further affirmative defense, this defendant alleges:

I.

Without waiving any matters or things heretofore set forth in this Answer and set forth in the First Affirmative Defense herein, this defendant further alleges that on or about, to wit, the 28th day of June, 1945, he filed his voluntary petition in bankruptcy and was adjudicated bankrupt on the 30th day of June, 1945; that said proceedings were had under File No. 37366 in the United States

District Court for the Western District of Washington, Northern Division, and this defendant pleads all matters appearing and shown in the record of said bankrupt proceeding by way of defense herein the same as though set forth and alleged herein in words and figures.

II.

That in the petition and schedules filed by this defendant as aforesaid, this defendant listed the United States of America as a creditor, and the plaintiff was in all respects given notice of the pendency of said bankruptcy proceeding; that in said schedules the Continental Casualty Company, one of the defendants in the above-entitled cause, was duly and regularly listed as a creditor, and the facts and circumstances making it necessary to make the said listings definitely referred to, outlined and explained the matters and things involved in this litigation.

III.

That neither the United States of America nor the said Continental Casualty Company, one of the defendants herein, ever filed any claim against this defendant and never asserted or brought matters pertaining thereto to the attention of the court in said bankruptcy proceeding, which said court at said time had ample jurisdiction to consider said matters; that under date of November 14, 1945, this defendant herein was granted a discharge in said bankruptcy proceeding, which said discharge as shown by the Order of Discharge is by way of

reference pleaded and made a part hereof the same as though incorporated herein in words and figures.

IV.

This defendant further alleges by way of defense herein that any claims asserted or to be asserted in this cause by the plaintiff herein or by the defendant Continental Casualty Company, are not within the exceptions to a discharge as appears in Chapter 3 of Section 17 of the Acts of Congress relating to bankruptcy, being known generally as the Chandler Act and approved June 22, 1938.

By way of Third Affirmative Defense herein, this defendant alleges:

I.

Without waiving any of the things raised in the Answer herein and without waiving any matters set forth in the First and Second Affirmative Defenses herein, this defendant alleges that the claim alleged and asserted by the plaintiff herein is in fact a penalty claim, and defendant further alleges that claims arising and sounding in and by way of penalty and penalty claims are not provable claims in bankruptcy and as against a bankrupt in bankruptcy proceedings, and that whether the said claim is provable or not, that the same is in all respects reduced to no force and virtue by reason of the discharge in bankruptcy hereinbefore pleaded.

Wherefore, this defendant having fully answered herein, prays:

1. That the plaintiff take nothing by reason of

the alleged cause of action set forth in the complaint herein, and that said complaint be in all respects dismissed and that this defendant have and recover his costs herein.

2. That it be held and adjudged herein that any damage suffered by the plaintiff herein is technical in character and that any alleged damage is "Damage Absque Injuria."

3. And that it be further held and adjudged herein that any claims asserted by the plaintiff herein are inequitable and unconscionable and of such nature and character as to shock the conscience of a chancellor.

/s/ HENRY W. PARROTT,
Attorney for Pat Duby, Doing Business as Pat
Duby Company, Defendant.

[Endorsed]: Filed July 14, 1950.

[Title of District Court and Cause.]

ANSWER OF PAT DUBY, DEFENDANT
HEREIN, TO CROSS-COMPLAINT OF
CONTINENTAL CASUALTY COMPANY,
A CORPORATION

Comes now the defendant, Pat Duby, doing business as Pat Duby Company, and by way of Answer and Affirmative Defense as against the Cross-Complaint of Continental Casualty Company, ad-

mits, alleges and denies in the form and manner as follows, to wit:

I.

The defendant Continental Casualty Company has interposed, served and filed a cross-complaint as against the defendant, Pat Duby, which said cross-complaint appears on pages 5, 6 and 7 of the Answer of said defendant Continental Casualty Company to the Complaint of the plaintiff herein.

II.

By way of answer to said cross-complaint, this defendant denies each and every allegation contained therein not herein expressly admitted, and particularly denies that he is indebted to the defendant Continental Casualty Company in the sum of \$3280.35 plus interest and costs or in any other sum.

By way of further answer herein and by way of affirmative defense herein, this defendant, Pat Duby, alleges:

I.

That on the 28th day of June, 1945, he filed his voluntary petition in bankruptcy in cause No. 37366 in the United States District Court for the Western District of Washington, Northern Division, and that he was adjudicated a bankrupt on the 30th day of June, 1945.

II.

That in his petition and schedules he named the defendant Continental Casualty Company, a corporation, as a creditor, and did particularly de-

scribe and make reference to his dealings with said Continental Casualty Company, a corporation, and did in his said schedules and petition particularly describe his relations with said company as having to do with the contract mentioned and described in the complaint of the plaintiff and in the Answer of the said defendant company; that said defendant company as a corporation received official and proper notice of the pendency of said bankruptcy proceeding, and had a full and complete opportunity and an exclusive opportunity to have all matters pertaining thereto settled and determined in said bankruptcy proceeding.

III.

That on the 14th day of November, 1945, the defendant, Pat Duby, was granted a discharge in bankruptcy discharging him from all liability arising by reason of the matters and things as shown in said petition and schedules and as is indicated and disclosed in the complaint herein and the Answer of the said defendant company.

IV.

That this defendant particularly sets forth by reference the records and proceedings of the above-entitled court in the said bankruptcy proceedings the same as though particularly set forth, alleged and repeated herein in words and figures.

Wherefore, this defendant having fully answered herein, prays that neither the plaintiff nor the defendant Continental Casualty Company, a cor-

poration, take anything as against him, and that it be held and adjudged that any liability ever incurred by said Pat Duby through the plaintiff or the said defendant company is fully and completely discharged, and that this defendant have such further, other and appropriate relief herein as may be proper in the premises and compatible with the usages and practices of the court.

/s/ HENRY W. PARROTT,
Attorney for Defendant, Pat Duby, Doing Business
as Pat Duby Company.

Receipt of Copy acknowledged.

[Endorsed]: Filed July 20, 1950.

[Title of District Court and Cause.]

REPLY OF PLAINTIFF TO ANSWER OF DEFENDANT PAT DUBY

Comes now the plaintiff in the above-entitled action and for reply to the affirmative matter set up in the answer of defendant, Pat Duby, doing business as Pat Duby Company, admits and denies as follows:

First Affirmative Defense

I.

By way of reply to paragraph I, plaintiff admits that the contract involved had to do with excavation work below the surface of the ground, but denies

each and every other allegation, matter and thing therein contained and the whole thereof.

II.

For reply to Paragraph II, plaintiff denies the same.

III.

For reply to Paragraph III, plaintiff denies the same.

IV.

For reply to Paragraph IV and Paragraph V, plaintiff denies the same.

V.

For reply to Paragraph VI, plaintiff denies it has wrongfully withheld from defendant, Pat Duby, the sum of \$979.08, or any other sum whatsoever.

VI.

For reply to Paragraph VII, plaintiff denies that it has been unlawfully enriched in the sum of \$979.08 or any other sum or sums whatsoever, arising out of the transaction herein involved and especially does it deny that it has been unjustly enriched in said transaction in the sum of \$6202.70, or any other sum whatsoever.

VII.

For reply to Paragraph VIII, plaintiff denies the same and the whole thereof.

VIII.

For reply to Paragraph IX, plaintiff denies the same.

Second Affirmative Defense

I.

Replying to Paragraph I, plaintiff admits that defendant, Pat Duby, on or about June 25, 1945, filed his voluntary petition in bankruptcy and was adjudicated a bankrupt in Cause No. 37366 of the records and files of this Court, but denies each and every other allegation, matter and thing therein contained.

II.

Replying to Paragraphs II and III, plaintiff admits the same.

III.

Replying to Paragraph IV, plaintiff denies the same.

Third Affirmative Defense

I.

Replying to Paragraph I, plaintiff denies each and every allegation, matter and thing therein contained and the whole thereof.

Wherefore, having fully replied, plaintiff prays the judgment of this Court as in its complaint herein set forth.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ JOHN E. BELCHER,
Assistant United States
Attorney.

[Endorsed]: Filed August 17, 1950.

[Title of District Court and Cause.]

REPLY TO ANSWER OF CONTINENTAL CASUALTY COMPANY

Comes now the plaintiff in the above-entitled action and for reply to the affirmative matter set up in the answer of defendant Continental Casualty Company, admits, denies and alleges.

First Affirmative Defense

I.

Relying to Paragraph I, plaintiff admits that defendant, Pat Duby, was awarded a contract by plaintiff to construct four concrete check dams and one concrete box culvert at the Seattle-Tacoma Airport at Seattle for the price of \$7,562.70, and that neither party knew of the conditions existing underneath the ground at said time or place, and that quicksand was encountered, but denies each and every other allegation, matter and thing therein contained.

II.

Relying to Paragraph II, plaintiff admits that a sixteen-day extension was granted by plaintiff to defendant on said job, but denies each and every other allegation, matter and thing therein contained and the whole thereof.

III.

Relying to Paragraph III, plaintiff admits the same.

IV.

Relying to Paragraph IV, plaintiff admits the

bankruptcy of defendant Pat Duby, but denies each and every other allegation, matter and thing in said paragraph, and the whole thereof.

Second Affirmative Defense

I.

Replying to Paragraph I, plaintiff denies each and every allegation, matter and thing therein contained and the whole thereof.

Third Affirmative Defense

I.

Replying to Paragraph I, plaintiff denies each and every allegation, matter and thing therein set forth and the whole thereof.

Wherefore, having made full reply to the new matter set up in the answer of defendant Continental Casualty Company, plaintiff prays the judgment of this Court as in its complaint set forth.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ JOHN E. BELCHER,
Assistant United States
Attorney.

[Endorsed]: Filed August 17, 1950.

[Title of District Court and Cause.]

**MOTION TO REQUIRE PLAINTIFF TO
PRODUCE DOCUMENTS**

Comes now defendant, Continental Casualty Company, by and through its attorneys of record, Skeel, McKelvy, Henke, Evenson & Uhlmann, and respectfully moves this Honorable Court for an order requiring plaintiff to produce and permit the inspection and copying of the following designated documents and to require plaintiff to produce said documents at the time of the trial, all in accordance with Rule 34, the Rules of Civil Procedure for District Courts of the United States.

The documents above referred to are as follows:

1. Copy of Contract No. C7ca-1454 for the construction of four concrete check dams and one twin-barrel concrete box culvert at the Seattle-Tacoma Airport entered into between the United States of America and Pat Duby.
2. A record and itemized listing of the dates and amounts of payments made under said contract by the United States of America to the contractor, Pat Duby.
3. Copies of any and all notices and/or letters claimed to have been given by the United States to Continental Casualty Company concerning the alleged delay or default of the contractor in the performance of said contract together with copies

of any and all notices or letters of claims by the United States of America against defendant, Continental Casualty Company, for liquidated damages.

This motion is supported by Affidavit of Willard E. Skeel, attached hereto.

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN,

By /s/ WILLARD E. SKEEL,
Attorneys for Defendant, Continental Casualty
Company.

State of Washington,
County of King—ss.

Willard E. Skeel, being first duly sworn on oath, deposes and says:

That he is one of the attorneys of record for the defendant, Continental Casualty Company, in the above action and that this affidavit is made in support of the foregoing motion for the production of documents. That Continental Casualty Company was never given, nor has it had access to, a copy of the contract mentioned in said motion. That the whereabouts of the defendant, Pat Duby, principal, upon the bond issued by Continental Casualty Company, as surety, is unknown and consequently this defendant cannot obtain a copy of said contract from the defendant, Pat Duby, nor can there be obtained from the defendant, Pat Duby, for the same reason a record of the dates and amounts of payments

made by the United States to the contractor, Pat Duby.

That the foregoing motion and affidavit were made in accordance with Rule No. 34 of the Rules of Civil Procedure.

/s/ WILLARD E. SKEEL.

Subscribed and sworn to before me this 12th day of April, 1951.

[Seal] /s/ DONALD S. VOORHIES,
Notary Public in and for the State of Washington,
Residing in Seattle.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 12, 1951.

[Title of District Court and Cause.]

NOTICE OF HEARING MOTION

To United States of America and to J. Charles Dennis, Its Attorney:

You, and Each of You, will please take notice that the defendant, Continental Casualty Company's, Motion for the production and discovery of documents will be heard before the above-entitled court on Monday, the 16th day of April, 1951, in the United States Court House, Seattle, Washington,

at 10 o'clock a.m. or as soon thereafter as the same may be heard.

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN,

By /s/ WILLARD E. SKEEL,
Attorneys for Defendant, Continental Casualty
Company.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 12, 1951.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on for trial before the undersigned, the Honorable John C. Bowen, senior, judge of the United States District Court, Western District of Washington, Northern Division, sitting without a jury on the 24th day of April, 1951; plaintiff, United States of America, being represented by John E. Belcher, Assistant United States Attorney, and the defendant, Pat Duby, being present in court and represented by his attorney of record, Henry Parrott, and the defendant, Continental Casualty Company, being represented by its attorney of record, Willard E. Skeel; and all parties having announced that they were ready for trial; and the court being possessed of jurisdiction of the cause and evidence and testimony having been adduced on behalf of all parties; and said cause

not being concluded on that day was continued for the purposes of completing the testimony and trial of said cause to May 1, 1951, and from that date until May 25, 1951, at 2:00 o'clock p.m., at which time the testimony was completed and final argument made for and on behalf of all parties; and the court at the conclusion of the said final argument, wishing counsel to submit additional or supplemental briefs and to argue the matter further, the same was continued for the purpose of preparing and filing such supplemental briefs to June 11, 1951, and at said time such supplemental briefs having been filed and an additional argument made and presented on behalf of all parties; and the court having considered the evidence and law in the case did at such time render its oral decision against the plaintiff in favor of both defendants and does hereby make the following

Findings of Fact

I.

The jurisdiction of this action is conferred upon this court by Section 1345, Title 28 U.S. Code.

II.

That the United States of America is now and at all times mentioned herein has been a corporation sovereign and in such capacity did bring this action by issuance of its summons and complaint herein.

III.

That the Department of Commerce is a depart-

ment of the Federal Government in charge of Civil Aeronautics Administration.

IV.

That Pat Duby, at all of the times hereinafter mentioned was a sole trader doing business under the style of Pat Duby Company, and Continental Casualty Company is a corporation, organized and existing under and by virtue of the laws of the State of Illinois, duly authorized as a surety under Government contracts and authorized to do a surety business in the State of Washington.

V.

That on or about the 7th day of September, 1944, the plaintiff, by and through the Department of Commerce, Civil Aeronautics Administration, by Proposal No. 7-45-109, called for bids for the construction of four concrete check dams, and one twin-barrel concrete box culvert at the Seattle-Tacoma Airport, Seattle Washington, and thereafter defendant, Pat Duby, bid the sum of \$6,602.70 for the job, said bid being the lowest and best bid received therefor, which said bid was accepted.

VI.

That thereafter and on, to wit, the 4th day of October, 1944, a formal written contract was entered into between the parties, the same being negotiated contract No. C7ca1454, by the terms of which defendant, Pat Duby, agreed to perform the said work of constructing four concrete check dams and one twin-barrel concrete box culvert for plaintiff at the Seattle-Tacoma Airport, Seattle, Washington, for

the total sum of \$6,602.70, said work to be commenced within five calendar days after date of notice to proceed, to be completed within thirty calendar days from that date, which time was subsequently extended an additional sixteen days for additional work requested to be done by the plaintiff.

VII.

That by the terms of Proposal No. 7-45-109 and particularly paragraph "H" thereof, is the following:

"Liquidated Damages. Subject to the provisions of Article 9 of the contract, the contractor shall be charged liquidated damages for each day of delay in completion of the schedule, as follows:

"Schedule 1—\$20.00 per calendar day."

VIII.

That thereafter and on or about October 4, 1944, defendant Duby received notice to proceed with the work and did thereafter proceed. That thereafter in proceeding with the work, defendant Duby encountered quicksand conditions under the crust of the earth which were not known to him at the time of entering into the contract nor were said conditions known to the government at said time. That as the season progressed that the said defendant Duby encountered excessive rainfall and wet conditions which, coupled with his encounter of a large body of quicksand, rendered completion of the work within the time limited under the contract most

difficult and burdensome. That said contract called for completion thereof within thirty days from October 4, 1944, to wit, November 4, 1944, but for additional work requested by the government which was performed by the defendant Duby a sixteen-day extension was granted bringing the time for completion to November 20, 1944.

That because of the excessive rainfall and the encounter with the quicksand, defendant Duby did not complete the contract until April 2, 1945, although the work was substantially completed, all except the cleanup, January 12, 1945. That the defendant, Pat Duby, consumed in the progress of the work one hundred thirty-three days in excess of the time limited for the completion of said work under the terms of the government proposal and by reason of such delay the United States commenced this action for the recovery of liquidated damages at the rate of \$20 per day or a total of \$2,660.

IX.

That the claim of the government for liquidated damages for delay in the completion of said contract commenced to run November 20, 1944. That all progress payments and all payments under the entire contract were made by the United States government to defendant, Pat Duby, subsequent to December 1, 1944. That from the last and final payment made by the government to defendant, Pat Duby, the government deducted in partial satisfaction of its claim for liquidated damages the sum of \$979.82.

X.

That because of the difficulties encountered in the performance of the said contract the said defendant, Pat Duby, expended in excess of \$17,000 and in addition thereto the defendant, Continental Casualty Company, paid the full penalty of its payment bond into the registry of this court in an interpleader action in Cause No. 1294 to be pro rated among labor and material claims resulting from the performance of said Seattle-Tacoma Airport job.

XI.

That on the 30th day of June, 1945, H. L. Duby, doing business as Pat Duby Company, was adjudged a bankrupt in the United States District Court for the Western District of Washington, Northern Division, in Cause No. 37366, according to the system of numbering bankruptcy causes in said court.

That within six weeks after the said adjudication of bankruptcy plaintiff herein had actual notice of the pendency of said bankruptcy proceeding and had full opportunity to participate in said bankruptcy proceeding and to assert any and all claims against the said bankrupt and particularly the claim asserted by the United States government in this case.

That on the 14th day of November, 1945, a formal decree was entered in the said bankruptcy proceeding discharging H. L. Duby, doing business as Pat Duby Company, in the manner and form as provided for in the Acts of Congress relating to Bankruptcy and the amendments thereto. That the said discharge in bankruptcy was regularly and properly pleaded herein and has been duly proven herein.

XII.

That defendant, Continental Casualty Company, had no notice of plaintiff's intended claim for liquidated damages resulting from delay in the performance of the contract by said Duby until receipt of letter dated September 11, 1946, from the General Accounting Office of the United States and therefore the said Continental Casualty Company had no opportunity to file a claim covering the government's claim for liquidated damages in the H. L. Duby bankruptcy proceeding.

Done in Open Court this 16th day of July, 1951.

/s/ JOHN C. BOWEN,
Judge.

From the foregoing Findings of Fact, the court does make the following:

Conclusions of Law

I.

That under the laws and decisions of the United States the plaintiff's claim is one for liquidated damages and not one for a mere penalty.

II.

That by virtue of Section 16 of the Bankruptcy Act, the discharge in bankruptcy of the defendant, H. L. Duby, does not constitute a discharge to Continental Casualty Company as surety upon the bond of the said H. L. Duby.

III.

That any and all claims asserted by the plaintiff herein against the defendant, Pat Duby, doing business as Pat Duby Company, were provable claims and discharged in bankruptcy proceedings in the United States District Court for the Western District of Washington, Northern Division, No. 37366, and that the said defendant, Pat Duby, is entitled to entry of a decree of dismissal herein with prejudice and without costs.

IV.

That defendant, Continental Casualty Company, is entitled to the entry of a decree of dismissal herein with prejudice and without costs based upon the evidence produced in this case which constitutes a complete defense to said defendant under the allegations set forth in its Third Affirmative Defense as pleaded herein on the ground that all the while the United States was claiming the accrual of liquidated damages by reason of the delay in the performance of said contract by defendant Duby, the said plaintiff government continued to make progress payments to the defendant Duby to the prejudice and detriment of the surety, Continental Casualty Company, which funds the plaintiff government could have and should have applied in reduction of its claim for liquidated damages and as a result of the government's failure to so withhold said funds the surety is released of its obligations under its performance bond.

V.

That plaintiff take nothing by its complaint either against defendant H. L. Duby or against Continental Casualty Company, and plaintiff's complaint be dismissed with prejudice and without costs and each party hereto shall pay its own costs.

Done in Open Court this 16th day of July, 1951.

/s/ JOHN C. BOWEN,
Judge.

Presented by:

/s/ WILLARD E. SKEEL,
Of Attorneys for Defendant, Continental Casualty
Company.

Approved as to Form:

/s/ HENRY W. PARROTT,
Attorney for Pat Duby.

/s/ J. CHARLES DENNIS,
/s/ JOHN E. BELCHER,
Attorneys for Plaintiff.

[Endorsed]: Filed July 16, 1951.

In the United States District Court for the Western
District of Washington, Northern Division

No. 2211

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PAT DUBY, Doing Business as Pat Duby Com-
pany, and CONTINENTAL CASUALTY
COMPANY, a Corporation,

Defendants.

JUDGMENT OF DISMISSAL

This cause having come on for trial before the undersigned, the Honorable John C. Bowen, senior judge of the United States District Court, Western District of Washington, Northern Division, sitting without a jury on the 24th day of April, 1951; plaintiff, United States of America, being represented by John E. Belcher, Assistant United States Attorney, and the defendant, Pat Duby, being present in court and represented by his attorney of record, Henry Parrott, and the defendant, Continental Casualty Company, being represented by its attorney of record, Willard E. Skeel; and all parties having announced that they were ready for trial, and the court being possessed of jurisdiction of the cause and evidence and testimony having been adduced on behalf of all parties, and said cause not being concluded on that day was continued for the purposes of completing the testimony

and trial of said cause to May 1, 1951, and from that date until May 25, 1951, at 2:00 o'clock p.m., at which time the testimony was completed and final argument made for and on behalf of all parties; and the court at the conclusion of the said final argument, wishing counsel to submit additional or supplemental briefs and to argue the matter further, the same was continued for the purpose of preparing and filing such supplemental briefs to June 11, 1951, and at said time such supplemental briefs having been filed and an additional argument made and presented on behalf of all parties; and the court having considered the evidence and law in the case did at such time render its oral decision against the plaintiff in favor of both defendants and having heretofore made and entered its Findings of Fact and Conclusions of Law, it is hereby

Ordered, Adjudged and Decreed that plaintiff herein take nothing by its complaint and that said complaint be and the same is hereby dismissed with prejudice and without costs. That each party shall pay its own costs herein.

Done in Open Court this 16th day of July, 1951.

/s/ JOHN C. BOWEN,
Judge.

Presented by:

/s/ WILLARD E. SKEEL,
Of Attorneys for Defendant, Continental Casualty
Company.

Approved as to Form:

/s/ **HENRY W. PARROTT,**
Attorney for Pat Duby.

/s/ **J. CHARLES DENNIS,**

/s/ **JOHN E. BELCHER,**
Attorneys for Plaintiff.

[Endorsed]: Filed July 16, 1951.

Entered July 17, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Pat Duby, doing business as Pat Duby Company,
and Continental Casualty Company, a corporation,
defendants herein, and

To Henry Parrott, attorney for Pat Duby, and
Skeel, McKelvy, Henke, Evenson & Uhlmann,
attorneys for Continental Casualty Company:

Notice is hereby given that the United States of America, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment of Dismissal entered in the above court on the 16th day of July, 1951.

/s/ **J. CHARLES DENNIS,**
United States Attorney.

/s/ **JOHN E. BELCHER,**
Assistant United States
Attorney.

[Endorsed]: Filed September 11, 1951.

[Title of District Court and Cause.]

ORDER TO TRANSMIT ALL EXHIBITS
TO COURT OF APPEALS

Upon the oral application of the United States Attorney, it is

Ordered that the Clerk of this Court transmit to the Clerk of the Court of Appeals for the Ninth Circuit all exhibits as part of the record on appeal herein.

Done in Open Court this 15th day of October, 1951.

/s/ JOHN C. BOWEN,
United States District Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 15, 1951.

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 2211

UNITED STATES OF AMERICA,
Plaintiff,

vs.

PAT DUBY, Doing Business as Pat Duby Com-
pany, and CONTINENTAL CASUALTY
COMPANY, a Corporation,
Defendants.

Before: The Honorable John C. Bowen,
District Judge.

TRANSCRIPT OF PROCEEDINGS
AT TRIAL

April 24, 1951, 10:00 A.M.

Appearances:

J. CHARLES DENNIS,
United States Attorney, and

JOHN E. BELCHER,
Assistant United States Attorney,
Appeared for the Plaintiff.

HENRY W. PARROTT
Appeared for Defendant, Pat Duby.

WILLARD E. SKEEL,

of Skeel, McKelvy, Henke, Evenson &
Uhlmann,

Appeared for Defendant, Continental
Casualty Company.

Whereupon, opening statements having been made by counsel for plaintiff and counsel for defendant Continental Casualty Company, the following proceedings were had and done, to wit:

FRED WILD

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Belcher:

Q. Will you state your name, please?

A. Fred Wild. [2*]

Q. What is your business, Mr. Wild?

A. I am with the Civil Aeronautics Administration as a planning engineer.

Q. And during the year 1944-1945, what was your occupation?

A. I was assistant chief of the engineering unit for the Civil Aeronautics Administration.

Q. Are you familiar with the project at the Tacoma-Seattle Airport? A. Yes, I am.

* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of Fred Wild.)

(Call for bids marked Plaintiff's Exhibit 1 for identification.)

(Drawings marked Plaintiff's Exhibit 2 for identification.)

The Court: Can one of counsel, agreeably to other counsel in the case, attribute to Plaintiff's Exhibit 1 a name that reflects the character of the information in it?

Mr. Skeel: It appears to be a call for bids, your Honor.

Q. You have been handed what has been marked for identification Plaintiff's Exhibit 1? Did you ever see that before? A. Yes, I have.

Q. By whom was it prepared?

A. By the Civil Aeronautics Administration. [3]

Q. What is it?

A. It is the call for bids for this particular job.

The Court: Whose call for bids?

The Witness: The Civil Aeronautics Administration.

Q. For what project?

A. For the construction of three check dams and a barrel culvert for drainage purposes south of the Seattle-Tacoma Airport.

Q. State whether or not a copy of that call for bids was sent to Mr. Pat Duby? A. It was.

Mr. Skeel: If you know, Mr. Wild.

The Court: Do not give an answer unless you personally know the answer.

The Witness: Yes.

(Testimony of Fred Wild.)

The Court: Do you know that answer of your own information?

The Witness: Yes, I do.

Mr. Belcher: I want to offer this exhibit at this time.

Mr. Skeel: No objection, your Honor.

The Court: Plaintiff's Exhibit 1 is now admitted.

(Plaintiff's Exhibit 1 received in evidence.)

Q. At the time that the call for bids was delivered to [4] Mr. Duby, was anything else delivered to him?

A. The plans that you have there and the standard contract conditions which he examines that becomes a part of the contract upon acceptance.

The Court: Let the witness have the exhibit, if there is any, that the witness' last statement referred to. The clerk advised me what has been marked Plaintiff's Exhibit 2 consists of several parts. The clerk will take one part and give to that a subnumber 2(a) and then to each and every other part give another subnumber; for instance, let the next part be numbered 2(b), etc. Read the question.

(Last question read by reporter.)

The Court: Your answer should be yes or no.

The Witness: No.

The Court: Nothing else was delivered to him at that time, is that right?

The Witness: That is right.

(Testimony of Fred Wild.)

Q. At a subsequent time, was anything further delivered to him? A. Not that I know of.

Q. When, if at all, were the documents which are before you now, marked for identification Plaintiff's Exhibits 2(a), (b) and (c), delivered to Mr. Duby?

A. They were all delivered at the same time that the [5] invitation, the bids, were sent out to prospective bidders.

The Court: Does the word "invitation" have the same meaning and is that what you have referred to formerly as a call for bids?

The Witness: Yes, your Honor.

Q. If I understand you correctly, they were delivered to Mr. Duby at the time the call for bids was delivered? A. That is right.

Mr. Belcher: I desire to offer these in evidence.

Mr. Skeel: No objection, your Honor.

The Court: Plaintiff's Exhibit 2, in three parts, described as (a), (b) and (c), is and are now admitted.

(Plaintiff's Exhibits 2 (a), (b) and (c) received in evidence.)

Q. What was the bid that was made, in round figures, made by Mr. Duby for this work?

The Court: If he made a bid.

Q. If he made a bid?

A. \$6,512.70 on this schedule.

Q. Previously had there been an engineer's estimate made as to what this project would cost, by the Civil Aeronautics Administration?

(Testimony of Fred Wild.)

A. Yes.

Q. How did that estimate compare with the bids made by Mr. Duby? [6]

A. It was slightly over \$100 more.

(Contract marked Plaintiff's Exhibit 3 for identification.)

Mr. Skeel: Might I inquire is this all going in as one exhibit, because there are several different documents.

Mr. Belcher: Yes.

Mr. Skeel: No objection to Exhibit 3.

The Court: Do you offer Exhibit 3?

Mr. Belcher: I offer Exhibit 3.

The Court: It is now admitted.

(Plaintiff's Exhibit 3 received in evidence.)

Q. Will you state what that is?

A. It is the contract covering this job.

Q. And it contains what?

A. It contains the contract face sheet which bears the acceptance of the Government on it. It contains the standard contract conditions, which has been signed by both the Government representative and, apparently, the contractor. It contains the performance bond signed by the contractor and the Continental Casualty Company, and an unsigned, unfilled-in certificate as to corporate principal, and a payment bond signed by the Continental Casualty Company and Mr. Duby, and the copy, similar copy of the invitation to [7] bidders incorporated in the

(Testimony of Fred Wild.)

formal contract, apparently. And there is a modification letter in here which modifies one of the drawings, and a list of specifications and drawings applicable, and the schedule of minimum wage rates to be paid, and a list of special equipment to be furnished by the Government, and the schedule of items to be performed under the contract, and attached to that is the form that covers the quotation solicited from various contractors and the prices they offered. That is the essence of these enclosures.

(Copy of letter of 4-4-45 marked Plaintiff's Exhibit 4 for identification.)

Mr. Skeel: No objection.

Q. You have been handed what has been marked for identification Plaintiff's Exhibit 4. Did you ever see that before? A. Yes, I have.

Q. What is it?

A. It is a letter to Pat Duby Company from our administrative officer extending 16 more days for additional work.

Mr. Belcher: I want to offer that in evidence.

The Court: What is the date of the letter?

The Witness: April 4, 1945.

The Court: It is admitted.

(Plaintiff's Exhibit 4 received in [8] evidence.)

Q. So far as you know, was any advice as to the conditions, any unusual conditions, surrounding this work given to any of the bidders?

(Testimony of Fred Wild.)

Mr. Skeel: Just a minute, Mr. Wild. I don't think this witness has as yet been qualified to answer that question, your Honor. He hasn't stated that he is the engineer on the job. All he has stated is that he was the original planning engineer. As far as I know, he was never on the job.

Q. What position did you occupy with respect to this particular job?

A. At that time, in the capacity of assistant chief of the unit, I prepared these specifications.

Q. Did you have direct supervision of the work?

A. No, I did not. That was handled by the construction unit. We prepared the plans and made the survey and issued the call for bids.

Q. As assistant chief of the engineering unit, what were your duties?

A. To ascertain the needed work and to assist in the supervision and the preparation of these plans to see if they would meet the need.

Q. And as the work progressed, did you have any supervision over it?

A. Not other than to make examinations that might help [9] us in making changes. The changes were made in our office.

Q. Who was the engineer on the job?

A. Mr. Doyle Affleck was the engineer on the job.

Q. Was there anybody else assisting?

A. Mr. Lester Hall was his assistant resident engineer.

Q. Where is Mr. Hall now?

(Testimony of Fred Wild.)

A. Mr. Hall is in the courtroom.

Q. Is he still connected with the Civil Aeronautics Administration? A. He is not.

(Copy of letter of 10-4-44 and receipt of 10-6-44 marked Plaintiff's Exhibit 5 for identification.)

Mr. Skeel: No objection, your Honor.

Q. You have now been handed what has been marked for identification as Plaintiff's Exhibit 5. Will you state what it is, Mr. Wild?

A. It is a letter to the Pat Duby Company from our acting administrative officer, who refers to his quotation. Do you want me to—

Q. No. It is a notice to proceed, is that what it is?

A. Yes, it is a notice to proceed, in essence.

Q. In other words, when you enter into a contract of this type, your regulations or the law requires that you give the contractor written notice to proceed? [10] A. That is right.

Q. And that is for the purpose of fixing the time, is it— A. That is right.

Q. —as to when the contract is to be completed? What was the time limit for the work to be completed?

A. The original work to be completed was—the time was thirty days without that extension that was in here of sixteen days.

Q. And Exhibit 4 extended that time for an additional sixteen days? A. Sixteen days.

(Testimony of Fred Wild.)

Q. State, if you know, Mr. Wild, how long it did take the contractor to finish this job.

A. Other than—I don't know personally, other than from the correspondence.

Mr. Skeel: I will object to any answer that this individual gives, then. He was not personally on the job. He stated he did not know from his own personal knowledge.

Q. Mr. Wild, are you still employed in the Civil Aeronautics Administration? A. Yes.

Q. Are these records that you are testifying from records that are kept in the ordinary course of the work under the [11] Civil Aeronautics Administration? A. Yes, they are our official files.

Q. Are those records in your custody?

A. They are not in my office, no.

Q. Well, are they in your custody?

A. I have access to them.

Q. And they are records of—

The Court: Ask the witness. You started to make a statement.

Q. What are those records?

A. They are the official records covering the work, the project.

Q. State whether or not they are kept in the regular progress of the work? A. They are.

(Copies of letters marked Plaintiff's Exhibit 6 for identification.)

The Court: I got the impression from what was said by defendant's counsel that there was no ob-

(Testimony of Fred Wild.)

jection to Plaintiff's Exhibit 5, and I did not hear Mr. Belcher make an offer.

Mr. Belcher: I offer Plaintiff's Exhibit 5, your Honor.

The Court: Plaintiff's Exhibit 5 is now admitted.

(Plaintiff's Exhibit 5 received in [12] evidence.)

The Court: There has been marked for identification Plaintiff's Exhibit 6.

Mr. Skeel: What do these contain, Mr. Belcher?

Mr. Belcher: They contain the records of correspondence between Mr. Duby and the Continental Casualty Company pertaining to this particular contract, all of the correspondence.

Mr. Skeel: I have no objection, your Honor, to any letters written by Mr. Duby to the Government, or any letters written by Continental Casualty Company to the Government, or any letters from the Government to Continental Casualty Company, but any other letters I must object to on the ground that they are not properly placed in evidence here. They are purely self-serving records of the Government. We have no opportunity to cross-examine the persons writing the letters.

Mr. Belcher: It is not my purpose, if I might interrupt, counsel, to introduce from this file anything except correspondence between the Civil Aeronautics Authority, Mr. Duby and the Continental Casualty Company. Anything else I will have the witness withdraw from the file.

(Testimony of Fred Wild.)

The Court: The objection stated by Mr. Skeel would relate to letters from representatives of the plaintiff to Mr. Duby or the Duby defendant. Did you intend to—— [13]

Mr. Skeel: On behalf of Continental Casualty Company, I would object to any letters from the Civil Aeronautics Administration to Mr. Duby as not being in any way binding on Continental unless it is shown that copies went to Continental.

Mr. Belcher: I might say, if your Honor please, that I had all of these letters and documents that I intended to introduce in photostatic form. They came with black backgrounds. In other words, as Washington is wont to do, they sent the black background documents, which necessitated my having to invoke the aid of the Public Printing Office in the City of Seattle for the purpose of having them made positive copies.

Unfortunately, they were not able to get them and will not be able to get them until noon today, and all of these documents I have offered in evidence, with the exception of the maps, I am going to ask that I might substitute photostatic copies for them, because I do not want to disrupt the permanent records of the Civil Aeronautics Administration.

The Court: That can be attended to later. Read Mr. Skeel's last statement.

(Last statement of Mr. Skeel read by reporter.)

The Court: Do you wish to meet that with proof,

(Testimony of Fred Wild.)

or do you wish to withdraw any offer where that condition [14] stated by Mr. Skeel is not present or met, or what is your attitude?

Mr. Belcher: I would like to inquire of the witness if he knows in all correspondence that was had between Pat Duby and the Civil Aeronautics Authority, whether copies of that correspondence were sent to the Continental Casualty Company, the surety on his bond?

Mr. Skeel: If you know personally.

A. I do not know.

Q. You do not know?

A. I do not know.

Mr. Belcher: In that event, if your Honor please, I will have the witness withdraw from the file when it is handed to him, so far as the Continental Casualty Company is concerned, any correspondence with Pat Duby.

The Court: How are you going to withdraw it so far as Continental Casualty Company is concerned if you want it in so far as Pat Duby is concerned?

Mr. Belcher: I want it in as far as Pat Duby is concerned, and I will make a separate offer as to Pat Duby.

The Court: Is there any objection on the part of Pat Duby? Are you offering Plaintiff's Exhibit 6?

Mr. Belcher: If your Honor please, I think notice to Pat Duby is notice to his bonding company.

The Court: You are now changing your [15] previous statement of attitude?

(Testimony of Fred Wild.)

Mr. Belcher: Yes, your Honor, I think I am entitled to have these letters introduced in evidence.

Mr. Skeel: If your Honor please, notice to Mr. Duby is not notice to his bonding company. They are separate concerns entirely. The letters themselves do not show that copies went to Continental Casualty Company, and I am informed by the administrative officers of Continental Casualty Company that as a matter of fact they did not receive those letters. They did receive some letters, and any letters that were sent to Continental by the Civil Aeronautics Administration, I have no objection to.

The Court: If the letter was written to the principal contractor who was the principal on the surety bond in the ordinary course of the contract work and did not involve some express waiver of risks, waiver which involved additional risks of the surety, the Court would suppose, in the absence of counsel showing the Court some statement of authority to the contrary, that the admission in evidence generally of the document would not depend upon a copy being sent to the surety. The surety did not by becoming surety on the bond become entitled to be regarded as a third party to the acts of the parties on the contract.

If counsel for Continental Casualty Company has some [16] authority for his position, I would ask him to let me see that before I finally rule upon it. In making the statement I have just made, I would not wish any part of it to refer to an instance where

(Testimony of Fred Wild.)

there was a question of an extension of time or a modification or amendment of the contract or anything relating to an increase in the amount of the work, or in giving up or in releasing the contractor principal on the surety bond from some obligation under the contract or doing something that added to his obligation or increased his obligation, thereby incidentally increasing the risk of the surety.

I am not speaking of those situations, but so far as concerning the course of the work is concerned, the dealings of the parties in connection with the work, I would think, in the absence of a statement from counsel of authority to the contrary, that the objection should not be well taken.

Mr. Skeel: I do not have such authority, your Honor. The theory of my objection to that is in connection with our third affirmative defense, and that is the principal reason I gave my opening statement at the time I did rather than reserve it, so that the Court would understand what Continental Casualty Company was getting at.

We claim and maintain, as set forth in our third affirmative defense, that we have had no notice of any [17] kind of any claim by the Government for penalty or liquidated damages at the rate of \$20 per day that the Government was making until approximately a year or a year and a half after completion and acceptance of the contract. It is true that there are in the files which Mr. Belcher is asking to be admitted correspondence between the Government and Mr. Duby in connection with

(Testimony of Fred Wild.)

the difficulties that he was having and in connection with his various and sundry requests for extension of time, but I still maintain that Continental at no time was ever advised that the Government was making any claim for this \$2,600 or any other sum for liquidated damages.

Our third affirmative defense is partially based on estoppel, and I feel that to allow correspondence between the Government and Mr. Duby which Continental Casualty Company never had any notice or knowledge of is, in effect, to jeopardize and tear down without our consent or knowledge the effect of our third affirmative defense.

The Court: Insofar as that objection is concerned, the Court overrules that objection, and I say to counsel and all the parties in the case that if you can convince me by a showing of authority before the Court makes a decision on the merits that this ruling is wrong, the Court will modify this ruling to the extent and in the [18] respect in which you convince the Court later that the Court is wrong; but I wish to say to all that my statements in this connection do not relate to any particular situation, if there is any, where the Government expressly by some new act either gave to the defendant Pat Duby some advantage or took away from him some advantage that increased in any way the surety's risk or took away any rights which the surety had against its insured. Is that clear?

Mr. Skeel: Yes, your Honor.

(Testimony of Fred Wild.)

Mr. Belcher: That is clear.

Mr. Skeel: Perhaps under your ruling the letters should be handled piecemeal, or some better method devised, because we have a group here of I do not know how many letters.

Mr. Belcher: May I suggest, if your Honor please, I think I can simplify this by taking out of this file—I didn't want to disrupt it if I could help it.

Mr. Skeel: Mr. Belcher, I have some photostatic copies of those if you would prefer to use them.

Mr. Belcher: May we take a moment, your Honor? I think it will save time in the long run.

The Court: You may do that.

Mr. Belcher: I think we can save considerable time, your Honor. [19]

Mr. Skeel: I have no objection to that group.

Mr. Belcher: May I have these three documents marked?

The Court: Let them keep the mark they already have, and if there is something else besides that, let something else have another mark.

Mr. Belcher: That is satisfactory. These exhibits, if your Honor please, are being offered as to the Continental Casualty Company.

Mr. Parrott: If your Honor please, among the various items in this Exhibit 6 that we have been disassembling and checking there is one letter that defendant Pat Duby would presently ask and demand that it be made available here as a part of

(Testimony of Fred Wild.)

the evidence to be introduced on behalf of the defendant Pat Duby. The letter in question is—

The Court: I would think it would be much more certain and definite if you would withhold this statement until counsel for the Government makes some definite reference to it.

Mr. Parrott: He is not going to make any reference to it. It is one of the items that has been eliminated.

The Court: Will you wait a moment? Then I will give you an opportunity to complete your statement. Mr. Clerk, have you back in your hands that portion of the file which you previously identified as Plaintiff's [20] Exhibit 6?

Mr. Belcher: He has eliminated the marks.

The Court: Let all of that file be returned to Mr. Belcher. There is now in the Clerk's hands Plaintiff's Exhibit 6, which is a substitute exhibit for the one previously so marked. It consists of how many sheets of paper?

Mr. Belcher: Three letters, your Honor.

The Court: What is now Plaintiff's Exhibit 6 consists of three sheets of paper. Two of them are on the letterheads of Continental Casualty Company, and one of them is what purports to be a carbon copy of a letter dated April 19, 1945, from D. S. Anderson, Chief, Contract and Service Branch, to Continental Casualty Company.

Q. (By Mr. Belcher): Mr. Wild, you have now been handed what has been marked for identifica-

(Testimony of Fred Wild.)

tion as Plaintiff's Exhibit 6. Did you ever see those documents before? A. I have.

Q. They are part of the official records of the—what are they?

A. They are part of our official records, retained in our file of the project.

Mr. Belcher: I want to offer them in evidence.

Mr. Skeel: No objection, your Honor.

The Court: Is there any objection to this [21] offer?

Mr. Parrott: I have no objection.

The Court: Plaintiff's Exhibit 6 is now admitted.

(Plaintiff's Exhibit 6 received in evidence.)

The Court: Mr. Parrott, you may now make or complete your statement. The court reporter will read the statement made by you up to this time.

(Statement read by reporter as follows: "Mr. Parrott: If your Honor please, among the various items in this Exhibit 6 that we have been disassembling and checking there is one letter that defendant Pat Duby would presently ask and demand that it be made available here as a part of the evidence to be introduced on behalf of the defendant Pat Duby. The letter in question is"—)

The Court: Identify it.

Mr. Parrott: Is dated August 11, 1945, on the stationery of the Department of Commerce, Civil Aeronautics Administration, Washington 25, ad-

(Testimony of Fred Wild.)

dressed to the Regional Administrator, Seventh Region, Attention 7-170, signed by C. M. Estep, A-190, Contract and Service Officer. I would like at this time to have it offered in evidence on behalf of the defendant Pat Duby. It is out of order, maybe, at this time, but I would like to have it at least identified as an exhibit that will at [22] some time be offered on behalf of Pat Duby.

Mr. Belcher: The Government joins in the request.

The Court: Let it be marked Plaintiff's Exhibit 7.

(Letter of 8-11-45 marked Plaintiff's Exhibit 7 for identification.)

The Court: Do you, Mr. Skeel, object to what is now marked Plaintiff's Exhibit 7?

Mr. Skeel: I haven't seen it, your Honor.

Mr. Parrott: Defendant Duby's exhibit.

The Court: Mr. Belcher, do you wish to offer it along with Mr. Parrott?

Mr. Belcher: Yes, your Honor.

The Court: Let it be marked Plaintiff's Exhibit 7. I wish counsel would have in mind that the Court prefers to let counsel look at an exhibit or document for the purpose only of letting counsel make up his mind as quickly as possible whether he has any objection to it.

Mr. Parrott: There is no objection to it so far as defendant Duby is concerned.

The Court: Counsel will have a later opportunity of studying it in detail.

(Testimony of Fred Wild.)

(Certified copy of settlement marked Plaintiff's Exhibit 8 for identification.)

Mr. Skeel: On behalf of the Continental Casualty Company, your Honor, we feel that that letter is not binding or [23] representing any notice of the contents therein to Continental Casualty Company at that time.

The Court: Do you object to its admission?

Mr. Skeel: Since counsel for Mr. Duby wishes it in, I have no objection to it from his standpoint of the case, but I object to its in any way binding Continental Casualty Company with knowledge of its contents as of that time. For that limited purpose, with that exception, I have no objection to its entry.

The Court: Do you ask the Court to admit it without any reservation as to its being admissible against the defendant Continental?

Mr. Belcher: Yes, I do.

The Court: On what theory? It has not been established yet. Let the witness see it, if you think you can establish its authenticity by the witness. If you cannot, reserve your offer until you can establish its authenticity.

Mr. Skeel: I have no objection to its authenticity. I am not objecting on that ground. It is a letter from one agency of the Government to another agency, and I do not believe Mr. Belcher is offering it or claims that the contents of that letter were made known to Continental Casualty Com-

(Testimony of Fred Wild.)

pany. That is the only limitation of my [24] objection.

The Court: I understand you object to its being used as evidence against your client, Continental Casualty Company, is that true?

Mr. Skeel: That is correct.

The Court: Do you object to its being admitted in evidence against your client?

Mr. Skeel: Only insofar as Continental is not bound by the knowledge of its contents.

The Court: That is a distinction without a difference, so far as I am concerned, in determining its admissibility.

Mr. Belcher: I think it comes in under your Honor's former ruling.

The Court: The Court will not pass upon this, and give counsel an opportunity to establish its authenticity so that I can tell whether or not it should be admitted in evidence. Proceed.

Q. (By Mr. Belcher): Mr. Wild, you have been handed what has been marked for identification as Exhibit 7. State whether or not that constitutes part of the official files.

A. This is 7 that I have in front of me. Yes, it is.

Q. And in connection with what?

A. In connection with this particular project. It is from our Washington office to our regional office.

The Court: What is the identity of the paper or [25] exhibit referred to by the witness now?

(Testimony of Fred Wild.)

Mr. Belcher: It was Exhibit 7.

The Court: That has in it a certificate and black background photostat.

Q. (By Mr. Belcher): Did you ever see that document before? A. Yes, I have.

Q. Where did you see it?

A. In our official files with this case.

The Court: You mean the plaintiff's official files?

The Witness: The Civil Aeronautics Administration's official files.

Q. Relating to what?

A. Relating to the Pat Duby Company construction job project.

Q. Is that the contract involved in this case?

A. That is.

Mr. Belcher: I want to offer what has been marked Exhibit 8, which is a certified copy.

The Court: I have not yet ruled upon 7. Let me see both 7 and 8.

Mr. Belcher: I offer 7.

The Court: Look at Exhibits 7 and 8 and see which one you are speaking of now.

Mr. Belcher: I do not think this needs any identification, if your Honor please. The statute—[26]

The Court: Let's finish the first one you mentioned.

Mr. Belcher: I offer No. 7.

Mr. Skeel: I renew my objection to 7, your Honor, on the further ground that, as I understand, your Honor's previous ruling was that notice to

(Testimony of Fred Wild.)

Duby might possibly be construed as notice to Continental Casualty Company. Plaintiff's Exhibit 7 is on the letterhead of the Civil Aeronautics Administration in Washington, D. C., to the Regional Administrator of the Civil Aeronautics Administration here in Seattle, doesn't purport ever to have been given either to Continental Casualty Company or to Mr. Duby, and therefore, on behalf of Continental Casualty Company, I object to its entry as against Continental only.

Mr. Parrott: On behalf of the Defendant Duby, we re-offer the Exhibit 7.

Mr. Belcher: No objection.

The Court: As tending to prove what issue?

Mr. Parrott: As tending to prove the Civil Aeronautics Authority had actual notice of the pendency of the bankruptcy proceedings.

The Court: Do you set up some defense relating—

Mr. Parrott: I do, if your Honor please.

The Court: What is the defense alleged in that connection? [27]

Mr. Parrott: The defense is that the United States of America had notice of the pendency of the bankruptcy proceedings.

Mr. Belcher: That would make no difference, your Honor, under the statute. The statute is very plain.

The Court: I understand you want it in, Mr. Parrott wants it in. Why are you objecting to it now?

(Testimony of Fred Wild.)

Mr. Belcher: I am not objecting to it.

The Court: Mr. Belcher, it is not clear in the Court's mind on what theory at this moment you offer an inter-office communication between offices of the plaintiff when you do not claim up to now, so far as I have heard, that the communication ever came to the attention of either the Defendant Duby or the Defendant Continental Casualty Company.

Mr. Belcher: I am just not objecting to counsel's offer. If he wants to offer it, I don't care to offer it.

The Court: The objection is overruled. Plaintiff's Exhibit 7 is admitted upon the offer of the Defendant Pat Duby.

(Plaintiff's Exhibit 7 received in evidence.)

Mr. Belcher: Now, if your Honor please, counsel both have examined what has been marked for identification as Plaintiff's Exhibit 8, being a certified copy of the [28] determination made by the General Accounting Office in connection with this contract. The witness has never seen this. This is a document that, I take it, under the statute is admissible without proof.

Mr. Skeel: I have no objection to it.

Mr. Parrott: No objection.

The Court: The Court does not admit it because it has a black photostat in it, and the Court declines to receive it on that basis. You may proceed to something else.

(Testimony of Fred Wild.)

Mr. Belcher: You refuse admission on the ground that it is on black paper?

The Court: That is right. It is contrary to the Court's often-repeated rule in open court that the Court will not receive such.

Mr. Belcher: Your Honor will save an exception?

The Court: Allowed.

Q. (By Mr. Belcher): Counsel representing the Continental Casualty Company in his opening statement stated that the engineers for the Civil Aeronautics Authority ran test holes. What have you to say as to that, on this project?

A. I doubt that we did. There was no necessity for it, and we have none in our record, no record of it.

Q. Do you know, Mr. Wild, how long it was after you had served notice upon Mr. Duby to proceed with this work before [29] he actually commenced doing the work?

A. I do not know that.

Q. Do you recall writing any letter in October, 1944, to Mr. Duby in connection with the project?

A. A letter was written from our office.

(Photostatic copy of letter of 10-31-44, marked Plaintiff's Exhibit 9 for identification.)

Q. Did you ever see the original of what that purports to be?

A. I have seen copies of it, yes.

(Testimony of Fred Wild.)

Q. And that was a letter that was written in the ordinary course of business, was it?

A. That is right.

Q. And part of the official files of the Civil Aeronautics Administration? A. Yes.

Mr. Belcher: If your Honor please, I want to offer that.

The Court: Is there any objection?

Mr. Skeel: I would like to ask this witness a question or two.

The Court: You may do that, relating to admissibility.

Mr. Skeel: Who is Mr. Wilson, who appears to have written that letter?

The Witness: Mr. Wilson was our administrative [30] officer at that time.

Mr. Skeel: Where? Located here in Seattle?

The Witness: In Seattle for the Seventh Region of the Civil Aeronautics Administration.

Mr. Skeel: And you were working under his directions?

The Witness: He was in the contract and procurement group and he had charge of that office that took care of these particular matters.

Mr. Skeel: That is all the questions I have.

Mr. Belcher: If your Honor please, I offer the exhibit.

The Court: Have you any objection to the offer?

Mr. Skeel: No objection, your Honor.

The Court: Plaintiff's Exhibit 9 is now admitted.

(Testimony of Fred Wild.)

(Plaintiff's Exhibit 9 received in evidence.)

Mr. Belcher: If your Honor please, for the purpose of the witness refreshing his recollection, I take it I may hand him this file.

The Court: Is there any objection to counsel doing that? Let counsel see it.

Mr. Skeel: He may refresh his recollection from letters which he himself wrote, but I do not believe he can refresh his recollection from letters or documents made by other persons if he himself did not know about [31] it personally at the time.

Mr. Belcher: My purpose, if your Honor please, is to show that this file contains correspondence with the Defendant Pat Duby and with the Continental Casualty Company on this particular project, and that the witness will testify, as I understand it, that these are the records on this project kept in the ordinary course of business, of which he is at present the custodian, the records of which he is the custodian.

The Court: Do you intend to ask him if he during the progress of the work made any use of these files, or has made any use of them since, or what if anything he did do with reference to the information contained in the files?

Mr. Belcher: That is exactly what I intend to do, your Honor.

The Court: Complete the process of establishing your right to have this witness look at this file in case he gets into trouble with his memory.

(Testimony of Fred Wild.)

Mr. Belcher: It is for the purpose of refreshing his memory. Now, Mr. Wild—

The Court: There is objection to this witness using the file. Do you intend to try to establish by further evidence the right which you have to have the witness look at the file while he is testifying? [32]

Mr. Belcher: I want him to identify certain correspondence in that file as being correspondence—

The Court: If you want to do that, the file will have to be marked as an exhibit.

Mr. Belcher: Very well, your Honor. We will have it marked, if we might. The trouble is, I have disrupted the papers, your Honor.

The Court: Counsel has objected to certain things, and if you are going to try to lay a foundation that will enable you to make use of the file which you have announced your intention of making, and in the manner you last specified, then you are going to have to do something so that the Court can properly rule in this matter.

Mr. Belcher: In the interest of saving time, may I have the privilege of recalling this witness?

The Court: You may step down. Call the next witness.

Mr. Belcher: Mr. Hall.

LESTER HALL

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Belcher: [33]

Q. Will you state your name, please?

A. Lester G. Hall.

Q. What is your occupation?

A. I am now resident engineer of the Port of Seattle at the Seattle-Tacoma Airport.

Q. How long have you been in that position?

A. Approximately five years.

Q. Getting back to 1944, and the early part of 1945, by whom were you employed?

A. I was then employed by the Civil Aeronautics Administration.

Q. At Seattle? A. At Seattle, yes.

Q. And in what capacity?

A. I was assistant resident engineer at the Seattle-Tacoma Airport on the construction of the field.

Q. As such, were you familiar with this contract entered into by Pat Duby with the Civil Aeronautics Administration? A. Yes.

Q. Did you work on the project?

A. Yes.

Q. In what capacity?

A. Well, in general supervision.

Q. General supervision?

(Testimony of Lester Hall.)

A. For the Civil Aeronautics Administration, under the [34] resident engineer, who was Mr. Affleck.

Q. I will ask you if in your opinion, from your observation of the work that was being done by Mr. Duby, whether he prosecuted the work with ordinary energy?

Mr. Skeel: Just a minute. I will object to that, your Honor, as calling for a conclusion. This gentleman's opinion as to whether or not Mr. Duby was diligent or negligent, it seems to me, is not an issue in this case at all.

The Court: Do you make the point that there is in issue the question of the defendant's diligence and prosecution of work?

Mr. Belcher: Yes, your Honor. That is what this suit is about. He took 133 days when he was supposed to do it in 30 days.

The Court: You may have misspoken yourself, Mr. Skeel, but it appears to me your statement is not responsive to that situation.

Mr. Skeel: The manner in which Mr. Duby did it is in no way at issue here. Under the contract all we need to know is when he started and when the contract says he was supposed to finish and when he did actually finish, but not his manner or method of carrying on.

The Court: What allegation is there in plaintiff's complaint which tenders this issue? [35]

Mr. Belcher: Paragraph VI.

The Court: On page 2 of the complaint?

(Testimony of Lester Hall.)

Mr. Belcher: On page 2, where it is alleged that he contracted to do this work for \$6,602.70, "said work to commence within five calendar days after date of notice to proceed, to be completed within thirty calendar days from that date, which time was subsequently extended an additional sixteen days." Now I am trying to show by this witness, if your Honor please, that he didn't use proper diligence.

The Court: Where in the answer is there any proper diligence issue raised? Do you allege that he did not do it on time? Is there any other allegation that he did not finish in time, or that he should have finished it earlier than the contract time, or is there any other statement that might raise the issue of due diligence?

Mr. Belcher: That paragraph, if your Honor please, according to my notes, is admitted by Pat Duby, and the answer of the Continental Casualty Company denies it.

The Court: Then would not the pertinent inquiry be whether or not the contract was finished within 46 days?

Mr. Belcher: I will ask him that question.

The Court: The objection is sustained.

Q. (By Mr. Belcher): Mr. Hall, was the contract completed in the 46 days from the date of the commencement of the work? [36] A. No.

Q. How many days were consumed in the completion of the work, if you know?

A. Some 170-some days.

Q. State whether or not any test holes were

(Testimony of Lester Hall.)

made prior to the awarding of this contract, if you know.

A. There were none made, to my knowledge.

Q. None made to your knowledge? Was there anything unusual about the conditions at the site where this project was to be performed that were not observable to the ordinary individual who looked at it? A. No, not especially.

Q. It is alleged in the answer that they ran into quicksand. Do you know anything about that?

A. Some quicksand was encountered.

Q. Was that observable to one who would take the trouble to look and see before he entered upon the work? A. I think so.

Q. Were you on the job every day?

A. Well, I won't say that I was at that job every day, but practically every day.

Q. Did you have an opportunity to observe the type of employees that were hired by Mr. Duby to do this work? A. Yes.

Mr. Skeel: Just a minute. Your Honor, I will object [37] to that again. It doesn't make any difference whether he had good employees or bad employees. The only question in issue is whether under the terms of this contract they could collect the penalty once they proved the date of starting and the date of finishing.

Mr. Belcher: Will counsel agree as to the date with me, so that we can shorten this matter, as to the date the job was finished?

Mr. Skeel: No.

(Testimony of Lester Hall.)

Mr. Belcher: How about Mr. Duby?

The Court: At this point we will take the noon recess, and you can be deciding about that. Perhaps you can on further consideration shorten the trial by some such admission as to facts which you know the plaintiff can prove, if there are any such. I will say to those connected with this case that I will have to suspend this trial today if it is not finished today, and I will have to suspend it until next week.

Today is the last courtroom work that I can do this week except Friday, and that is filled. The other two days I expect to use in finishing the moving of my office, which I have been trying to find an opportunity to complete for several weeks, and the time has come when I must finish that particular job, which is over and above the courtroom work, so that I can thereafter resume [38] the courtroom work uninterrupted by any moving job. I regret the possibility of the interruption, but I thought I should at this time advise counsel of the fact that tomorrow and the next day I will not be available for courtroom work, and on Friday I have the courtroom time schedule filled, it seems to me now.

Mr. Skeel: We will make every effort to finish today, your Honor.

Mr. Belcher: I am just about through, your Honor.

The Court: All those connected with this case are excused until 2:00 o'clock and may now retire. Court is recessed until 1:45.

(At 12:02 o'clock p.m., Tuesday, April 24, 1951, proceedings recessed until 2:00 o'clock p.m., Tuesday, April 24, 1951.)

April 24, 1951—2:00 P.M.

The Court: If there are no other matters to come before the Court, you may resume the trial proceedings in the Duby case. The Witness Hall has resumed the stand for further examination. You may proceed.

Q. (By Mr. Belcher): Mr. Hall, as supervising engineer on this project, will you state when the work was started and [39] when it was completed?

A. It was started October 6, 1944, as I recall, and completed about the first of April in 1945.

Q. You don't know the exact date?

A. Not from memory I don't, no.

Q. From any records that you personally kept, Mr. Hall, is it possible for you to examine the files and determine those dates?

A. Well, they would be in the official files of the Government.

Q. Did you personally write any letters to Mr. Duby during the progress of the work?

A. Yes, I did.

(Copy of letter of 3-5-45, marked Plaintiff's Exhibit 10 for identification.)

Q. You are being handed what has been marked for identification as Plaintiff's Exhibit 10. Did you ever see that before? A. Yes.

(Testimony of Lester Hall.)

Q. What is it?

A. It is a letter I wrote to Pat Duby on March 5, 1945, regarding—

Q. What did it have reference to, Mr. Hall?

A. The status of the job at that time.

Q. What is the date of the letter? [40]

A. March 5, 1945.

Mr. Belcher: I want to offer that in evidence.

Mr. Skeel: My only objection, if the Court please, is that there was no knowledge or notice of that letter directed to Continental Casualty Company.

The Court: The objection is overruled. Plaintiff's Exhibit 10 is now admitted.

(Plaintiff's Exhibit 10 received in evidence.)

The Court: All of these rulings which are on that point that is raised by that objection, Mr. Skeel, are subject to later correction if you can later before the Court announces its decision convince me that the ruling is wrong, and I would welcome any authorities which you may wish to show me in support of your position.

Mr. Belcher: You may inquire.

Cross-Examination

By Mr. Skeel:

Q. I understood you to say, Mr. Hall, that you were the assistant resident engineer at Bow Lake during the construction of this particular contract, is that right? A. Yes.

(Testimony of Lester Hall.)

Q. And you were there from the commencement of the work in the summer of 1944, from the time of the call for bids? A. Yes. [41]

Q. Until the completion of the job?

A. Yes.

Q. And you were out there almost every day watching and supervising, were you?

A. Yes.

Q. Did you also have anything to do with supervising or engineering the principal contract in the leveling, grading and paving of the runways for the Bow Lake Airport? A. Yes.

Q. Was that job going on at the same time?

A. Just prior to the time of Duby's contract.

Q. That other contract started just prior?

A. No, it was completed, I think, just prior.

Q. It was completed prior to the commencement of Mr. Duby's? A. Yes.

Q. Did you have anything to do with the construction of the buildings at the Bow Lake Airport? A. Yes, sir.

Q. Was that going on at the same time?

A. No, the buildings at the airport were built not under the CAA.

Q. So you had nothing to do with that job, then?

A. Yes, I did have, but I was employed at that time with the Port of Seattle. [42]

Q. When was that time?

A. Starting about three years ago.

Q. In other words, more than a year after the completion of Mr. Duby's contract? A. Yes.

(Testimony of Lester Hall.)

Q. You were familiar with Mr. Duby's contract, were you? A. Yes.

Q. Did that contract call for Mr. Duby to resurface the roads? A. Yes.

Q. What was the answer? A. Yes.

Q. You can point that out, can you, in the contract?

A. I don't have the contract here now.

Q. It is in evidence as Exhibit 3.

A. Do you wish me to read it?

The Court: You do not wish him to read out loud, do you?

Mr. Skeel: No.

Q. If you have found the place, just answer me whether or not it does provide that Mr. Duby shall resurface the roads. A. Yes, it does.

Q. Were you in the party who went out to Bow Lake Airport with the prospective bidders just prior to the call for bids or at the time of the call for bids? [43]

A. I was out at the site available that day to show prospective bidders.

Q. Did Mr. Duby have a talk with you that day?

A. I don't recall.

Q. Was there anything out there that day that indicated to you that this contract would be anything but normal?

A. No, not under the general conditions that were there.

Q. Do you recall the time of year that you were out there in which prospective bidders were directed

(Testimony of Lester Hall.)

to come out and look over the site? Do you recall the time of year when that was? A. I do.

Q. When was it? A. Early October.

Q. Wasn't it in the summertime?

A. Or maybe the latter part of September.

Q. Wasn't it back in August?

A. Well, it was probably a month before the opening of bids.

Q. You say "probably." You don't recall the date?

A. I don't recall the exact date, no.

Q. Or even the time of year?

A. Well, I recall, yes, that it was in the latter part of summer or early fall.

Q. What was the condition of the site of the projected [44] work at that time in late August or early September, the time we have just been referring to, as to amount of water on the site?

A. Oh, there was very little water flowing down the stream channel at that time.

Q. Coming right down the site was a small stream, was there not? A. Yes.

Q. And that was almost dry and was carrying very little water? A. That is correct.

Q. Did you know at that time that there was a substantial amount of quicksand under the surface of the earth? A. No.

Q. Did you know at that time that there were subterranean springs and streams that were not on the surface? A. I assumed that there was.

(Testimony of Lester Hall.)

Q. Did you advise the prospective bidders that there were subterranean springs?

A. I did not.

Q. You did not so advise them? A. No.

Q. There was a change order, I believe is the correct name for it, I may be in error, a change order or modification order directing Mr. Duby as the contractor to perform [45] some extra work, was there not? A. Yes.

Q. Do you recall the date of that change order?

A. I think it was November 4th.

Q. That is the date it bears, yes. Do you remember on what date it was delivered to Mr. Duby?

A. No, I don't know that.

Q. Would you deny Mr. Duby's statement that that change order was handed to him on December 15, 1944, almost a month and a half after the date it bore? A. No, I wouldn't deny it.

Q. I didn't hear your answer.

A. I say I wouldn't deny that.

Q. Did the payments, the progress payments for Mr. Duby's work come through your office? Did you have any supervision or authority over those?

A. I had supervision over the preparing of the quantities and the submitting of the amount of work that had been done to date.

Q. Can you give me the dates and amounts of payments made to Mr. Duby under his contract?

A. No.

Q. It is true, is it not, Mr. Hall, that Mr. Duby's contract was substantially completed on January

(Testimony of Lester Hall.)

12, 1945, with the exception of filling in some rip rap and the cleanup [46] work?

A. No, I don't believe that is so.

Q. Is it not true that because of the heavy rains and mud condition and the quicksand prevailing there that Mr. Duby was unable to get his tractors into the site after January 12th and until the last part of March in order to perform that cleanup and leveling work?

A. I don't believe that he encountered any quicksand in his operations on the cleanup.

The Court: What form did that quicksand have? Can you describe its visual characteristics so that a lay mind would recognize its presence if a layman came upon the substance which you refer to as quicksand?

The Witness: Well, it is just like ordinary sand except that it is saturated with water and isn't stable.

The Court: Does it have any clay with it at all?

The Witness: It may or it may not. Generally not, though, I believe.

The Court: Was its water content the thing that made it troublesome, or would it have been troublesome if it had had no water content? Would it have been troublesome in these contract operations, if you know?

The Witness: No, I think the only time that it is unstable is when it has water with it. That is extremely hard to handle. [47]

Q. (By Mr. Skeel): The contract for the level-

(Testimony of Lester Hall.)

ing and paving of the Bow Lake Airport runways was in no way held up as a result of the delay of Mr. Duby in performing his contract, was it?

A. I would say no, not to my knowledge.

Q. Nor was the performance of any other contract in the Bow Lake area held up or delayed as a result of Mr. Duby's delay in the performance of his contract, is that a correct statement?

A. I don't believe any other contracts were affected by it.

Q. As a matter of fact, there was no actual damage of any kind or nature accrued to the United States Government as a result of Mr. Duby's delay in the performance of his contract?

Mr. Belcher: Objected to as immaterial. This is a suit on a contract which specifically provides that for each day's delay he shall pay a penalty of \$20.00. The question of damages doesn't enter into this question.

The Court: You mean the question of actual damages?

Mr. Belcher: Yes.

Mr. Skeel: I contend the law is the other way, your Honor, and I have pleaded it in both my first and second affirmative defenses, and I believe Mr. Duby has pleaded it likewise in one of his affirmative defenses, that no [48] actual damage of any kind or nature was sustained by the United States Government as a result of the delay in the performance by Mr. Duby of his contract.

Mr. Belcher: May I read the provision that is

(Testimony of Lester Hall.)

already in evidence, if your Honor please. The parties agree in this contract that liquidated damages in the amount of \$20.00 per day for each day's delay would be paid by the contractor. He is trying to vary the terms of that contract by trying to get the admission from this man that there weren't any damages. In the contract he is required to pay that amount for each day's delay, regardless of whether there was any substantial damage or not.

Mr. Parrott: I would like to urge, if your Honor please, that the question of whether this is a reasonable amount or not is a material question. The test in the cases seems to be that if the amount provided for is unconscionable it will be treated as a penalty and not as a measure of damages. This penalty claim amounts to 40-plus per cent of the amount of this contract, and our contention is that under that situation the Court is entitled to hear the facts, and that is the only way the facts can be developed, is by the progress of examination along the lines being followed by counsel. I submit, in order for the Court to determine that question, which is a judicial question to be determined by the Court, as to [49] whether or not this is an unreasonable, unconscionable penalty, that is the only way we can arrive at it.

Mr. Belcher: We are not called upon to meet that kind of issue under the pleadings, your Honor.

The Court: Both sides, as I understand, have said that the respective answers of the two defendants raise that issue.

(Testimony of Lester Hall.)

Mr. Belcher: We deny it. They simply say we didn't suffer any damages.

The Court: And the plaintiff denies that allegation?

Mr. Belcher: Yes.

The Court: Did the plaintiff ask the Court to strike the allegation or—

Mr. Belcher: I don't believe we did.

The Court: ——otherwise hold it improper?

Mr. Belcher: No, I don't think there was any motion made, but this is purely a suit upon this contract. It isn't a question as to the reasonableness or unreasonableness of this contract that they entered into. The contractor agreed that if he did not complete this job within the time specified in the contract—there are many reasons why the Government wants these things completed quickly, aside from the question of any special damages that might be incurred by reason of the fact that it was not completed by that time. [50]

The Court: I am going to overrule the objection to the offered proof, but in doing so I do not wish anyone connected with the case to understand that the Court does or does not at this time by implication or otherwise rule that this evidence tends to establish an adequate defense. It is merely because the pleadings are still before the Court raising this defense that the Court admits the evidence.

Q. (By Mr. Skeel): You may answer the question. Do you recall what it was? A. No.

Q. Will the reporter read it?

(Testimony of Lester Hall.)

(Last question read by reporter as follows:
"Q. As a matter of fact, there was no actual damage of any kind or nature accrued to the United States Government as a result of Mr. Duby's delay in the performance of his contract?"")

A. That I do not know.

Mr. Belcher: Just a minute.

Q. Do you know of any actual damage?

Mr. Belcher: Just a minute, if the witness understands the question. That is a pretty broad term, any damage to the United States.

Mr. Skeel: Any actual damage.

Mr. Belcher: I object, if your Honor please. [51] Certainly under the terms of the contract the Government has been damaged at the rate of \$20.00 a day.

The Court: The objection is overruled. If the witness can answer the question, he may do so. I understood him to say he did not know the answer to the question, —

Mr. Belcher: Exception.

The Court: — is that what you intended to say?

The Witness: That is right.

Q. (By Mr. Skeel): Do you know of any actual damage which accrued to the United States as a result of Mr. Duby's delay in performance?

A. I can see where the Government was put to a considerable amount of expense.

(Testimony of Lester Hall.)

Q. Do you know of any actual damage which accrued to the Government as a result of the delay? If so, specify it.

A. I don't know of any damages.

Mr. Skeel: That is all the questions I have.

The Court: Does the Defendant Duby's counsel wish to ask any questions not covered already by Mr. Skeel's questions?

Q. (By Mr. Parrott): It might assist the Court, Mr. Hall, if you could say something about the distance this objective was from the airfield or airport proper. [52]

A. Oh, less than half a mile, I believe.

Q. It was, however, distinctly removed from any of the normal operations around that airport, was it not?

A. That depends on what you mean by normal operations.

Q. Well, what other operations were there in this interim of half a mile between the airport proper and this operation, if any?

A. This operation took the drain waters from the airport.

Q. I understand, but that is not what I asked you. I asked you what was there in the way of airport operations between the site of the building of these dams and the airfield where the other work was being carried on?

A. There were no flight operations, if that is what you have in mind.

Q. Were there any operations at all? This was

(Testimony of Lester Hall.)

a distinct operation about half a mile away from the airport proper, wasn't it? A. Yes.

Q. Would you want to testify that the amount of this contract was the reasonable cost of doing that job?

A. I don't believe I want to answer that.

Q. From what you saw of this job you say—how often were you there, by the way, from November until April 1?

A. I don't recall. I think I was there probably nearly every day that there was any construction operations taking [53] place.

Q. When did you first see any quicksand on there?

A. When they were excavating for the Bow Lake check dam.

Q. Who was the first one that saw any quicksand on there? A. I don't know.

Q. Were you the first one, do you think, or do you think somebody else discovered it? Was it reported to you by somebody? Did you go down there later and confirm it?

A. I don't recall that, either.

Q. How many times were you down there on this site before Mr. Duby was there?

A. I was there several times before I encountered Mr. Duby on the site.

Q. Did you see the quicksand before or after you first saw Mr. Duby?

A. It may have been the same time that I saw Mr. Duby for the first time.

(Testimony of Lester Hall.)

Q. But you saw Mr. Duby and saw the quicksand at a time when they were doing excavating work, was that right? A. That is right.

Q. How far underground was this quicksand at that time?

A. Oh, I suppose two or three feet.

Q. And that was the first time you saw it?

A. That is right.

Q. You said on your direct examination that Mr. Duby by [54] making a casual examination of the site should have detected the quicksand. Do you want to stand by that?

A. I don't believe I said he should have detected the quicksand.

Q. You indicated that you could have detected it, did you not?

A. No, I didn't intend to give that impression.

Q. Was there any way anybody could detect that quicksand prior to the time the excavation was made?

A. I believe what I said was with a reasonable examination of the site that a person should have been able to determine the unstable condition of the soil.

Q. Well, you said that quicksand was down three feet. What would a man have to do in order to find that quicksand if he is contemplating bidding on the job?

A. The quicksand was overlaid with other material that wasn't any more stable.

(Testimony of Lester Hall.)

Q. I said, what would he have to do? The quicksand was overlaid by other material?

A. That was as unstable as the quicksand itself, practically.

Q. Down about three feet the quicksand was, though? A. That is right.

Q. That was in the bed of the creek, wasn't it?

A. Yes. [55]

Q. There would be how much space across this gully? This construction was going on in a gully, wasn't it?

A. It was going on across an existing stream channel.

Q. How wide was the construction work crosswise of this channel? What was the length of the crosswise channel?

A. About ten feet, I believe.

Q. If a man had to go down three feet in the bottom of the creek to strike the quicksand, how far would he have to go down at the shoulders of this dam or the outer margins of it, the ends of it?

A. I think about a total of seven feet.

Q. You spoke about this subterranean water. When did you first observe the action of subterranean water? A. I suppose in 1943.

Q. You knew about it all the time, the way that water acted there, did you?

A. It was evident to anybody, I think.

Q. Answer my question. You knew about it all the time from 1943, for a year before this contract was let, is that it? A. Yes.

(Testimony of Lester Hall.)

Q. You knew these bids were being called for, didn't you? A. Yes.

Q. Did you say you prepared anything in connection with those bids, or the calling of those bids?

A. No. [56]

Q. What? A. No, I did not.

Q. You had nothing to do with it? A. No.

Q. Do you know anything about the paperwork in connection with this business, this job?

A. As it affected the job after it was let.

Q. Have you ever done any work of this kind, like installing dams like this job contemplated?

A. Well, very similar to this, yes.

The Court: Court will be at recess for about five minutes.

(Recess.)

The Court: You may resume the interrogation.

Q. Mr. Hall, you said you knew about this water condition in 1943? A. I think that early.

Q. Did you ever communicate that to anybody in the downtown office of the Civil Aeronautics Authority? A. I didn't.

Q. Did you ever communicate it to any bidder that was bidding on the job? A. No.

Q. Was there anything that a fellow of ordinary intelligence—that would be a notice to him that there was [57] anything of that nature if he was on the premises in August? A. Yes.

Q. What would it be?

(Testimony of Lester Hall.)

A. That there was more water at one place in the stream bed, considerably, than there was at other places.

Q. Where were those evidences?

A. Well, there was a great deal more water at 200th Street where the double box culvert was constructed than there was at the first check dam.

Q. And a fellow, if he went around, could see there was more water in one place than there was another? A. That is right.

Q. Do you think that would indicate to him a dangerous condition should be anticipated there or not?

A. It would indicate one that should be investigated, at least, I would think.

Q. The check dams on the culvert were completed about the 12th of January, weren't they, 1945?

A. I don't know when each unit of the job was finished.

Q. But you did raise the question that something should be done with the road and there should be some cleanup work? You raised that question, didn't you? A. Yes.

Q. And that wasn't completed until about the first of April, is that right? [58]

A. That is right.

Q. If the check dams and culvert, the physical construction by way of placing them on the premises, if they were completed by the 12th of December,

(Testimony of Lester Hall.)

1944, the maximum utility of that improvement so far as the Aeronautics Authority was concerned and so far as expediency in the operations incident to this work were effective, were they not?

A. If they were completed to that extent, but I wouldn't say that they were completed, because I don't recall.

Q. But they were completed a long time before the first of April, weren't they?

A. Yes, they were completed at least by the first of March or fourth of March, when I wrote that letter.

Q. You wrote the letter on the fourth of March and you know that they were completed before that time?

A. That is right.

Q. You said something about this road. Where is this road? Whose property is it on?

A. I think it is a King County road.

Q. It is a county road, isn't it?

A. That is right.

Q. There is no responsibility of the Civil Aeronautics Authority to keep that road up in any way, is there?

A. They had a responsibility to restore it to its original condition. [59]

Q. They felt that they should require the contractor to do that, didn't they? The Authority felt that, didn't they?

A. They had the obligation to restore it to its original condition, yes.

Q. That is, the contractor had that responsi-

(Testimony of Lester Hall.)

bility? Isn't it a fact that you could use the road practically all the time?

A. Well, it was usable.

Q. From the 12th of January on, it was possible for people wanting to use the road to pass over it, was it not?

A. I wouldn't know if it was that early or not.

Q. But you have no recollection of any time after the 12th of January, 1945, that the public couldn't use the road?

A. No, I don't have any specific recollection that they couldn't.

Mr. Parrott: I think that is all.

Mr. Belcher: That is all.

The Court: You may step down.

Mr. Belcher: Mr. Wild.

FRED WILD

recalled as a witness by and on behalf of plaintiff, having been previously duly sworn, was examined and testified as follows: [60]

Direct Examination

By Mr. Belcher:

Q. Mr. Wild, I think you testified, did you not, that you were the engineer that prepared the engineer's estimate on this work? A. Yes.

Q. And in preparing the estimate, was it necessary for you to familiarize yourself with the condi-

(Testimony of Fred Wild.)

tions that obtained out where the work was to be done? A. Generally speaking, yes.

Q. And did you do that?

A. I looked the site over. I walked over the site.

Q. What, if anything, did you find unusual about the site where the work was to be performed, if anything?

A. There was nothing unusual other than there was a natural drainage channel, nothing unusual but what you would find in a drainage channel, a slight amount of water flowing and I noticed there is a report in one of the exhibits I made, I believe, more water in some spots than others, and in walking down the center of the channel below 200th Street South, I believe it is, the stream bed was soft in spots. You would sink in slightly. I didn't know how deep that extended, however.

Q. For what flow of water were the culverts provided?

A. I want to refer myself to the plans, refresh myself [61] with the plans. I believe there are around 162 feet. The double barrel culvert had an approximate area, cross-sectional area under the road of 42 square feet.

Q. What does that indicate? What does that provide for, a considerable flow of water or just a small quantity?

A. Well, the structure was designed to take care of all of the drainage of the Seattle-Tacoma Airport.

(Testimony of Fred Wild.)

Q. When you sent out your call for bids or your proposal, I think you testified to, were the prospective bidders requested by you to examine the site?

A. They were requested to. We have a clause in the specifications and the invitation that advises bidders to acquaint themselves with conditions at the site.

Q. What has been your experience as to the custom prevailing in this part of the country where the Government calls for bids for certain construction work as to whether or not the contractor goes over the ground prior to making his bid?

Mr. Skeel: I will object to general evidence of custom in this area. It isn't pleaded. We admit Mr. Duby was out there and carefully looked over the site.

Mr. Belcher: That is all I wanted to show. The admission is made, that is all I need.

Q. (By Mr. Belcher): Now, Mr. Wild, can you state from your examination of the records in your possession as to when [62] the work was commenced and when it was finished?

A. The notice to proceed was effective November 6, if my memory serves me right, the records that we had up here, and the records would indicate that the work ended April 2, 1945. I don't know when the work actually started, I just know the date of the notice to proceed.

The Court: April 2, 1945, was the work cessation date?

The Witness: Yes.

(Testimony of Fred Wild.)

Q. Have you made any computation as to the amount of time consumed over and above the 46 days that you testified to as being the period in which the work should be completed?

A. I have personally not. I haven't actually made that computation myself.

Q. Can you do so?

A. I could from the records we have there, I believe.

Q. How many days over and above the 46 days?

A. Well, if those records are correct, there were 133 days over the 46, which would make 179 days.

The Court: 133, did you say?

The Witness: I believe that is what the record stated, our statement of facts we submitted to Washington.

The Court: 133 days in excess of the contract time?

The Witness: Yes, according to the record.

Q. Are you familiar with the provisions of this contract that was entered into by Mr. Duby with the Civil Aeronautics? [63] The contract itself made provision, did it not, by Article 9 for damages by reason of delay?

A. Yes, it is a standard clause.

Mr. Belcher: At this time I would like to read that provision of the contract, which has already been introduced in evidence.

The Court: As Plaintiff's Exhibit 3. You may now read it.

Mr. Belcher: Article 9. Delays—Damages. "If

(Testimony of Fred Wild.)

the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances and plant as may be on the site of the work and necessary therefor. If the [64] Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event it will be impossible to determine the actual damages for the delay and in lieu thereof the contractor shall pay to the Government as fixed, agreed and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: * * *"

Mr. Skeel: Mr. Belcher, you should read the proviso also.

Mr. Belcher: I will read the proviso. "Provided,

(Testimony of Fred Wild.)

That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes, if the contractor shall within 10 days from the beginning [65] of any such delay (unless the contracting officer, with the approval of the head of the department or his duly authorized representative, shall grant a further period of time prior to the date of final settlement of the contract) notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned or his duly authorized representative, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto."

Q. (By Mr. Belcher): Was there any complaint

(Testimony of Fred Wild.)

made to your knowledge to the Civil Aeronautics Authority about severe weather conditions?

A. I believe there was.

Q. And what, if any, decision was made by your proper administrative officers concerning those delays?

A. I believe Mr. Duby was requested to furnish the facts to us and I think we transmitted them to Washington by a statement of facts. [66]

Q. Was that in the nature of an appeal?

A. On whose part?

Q. As referred to in the contract?

A. Well, I wouldn't say. I would imagine it would be on Mr. Duby's part a request for relief.

Q. What, if you know, was the final decision of the Washington officials?

A. I don't know what Washington's final decision was.

Q. Is there anything in this file from which you can refresh your recollection as to what decision was made by the officials in Washington?

A. There may be. I don't know of them right now. I know of our regional recommendation, however.

Q. Do you know whether or not there appears in the records in your possession of this job, which took place some five or six years ago, as to whether or not your office referred the matter to the General Accounting Office?

A. Well, our Washington office would have done that, yes.

(Testimony of Fred Wild.)

Q. And the fact, if it is a fact, that the General Accounting Office communicated with Mr. Duby with reference to it would indicate what?

A. Well, it would not be settled, I would assume. That is an assumption on my part, however.

Mr. Belcher: I think you may inquire. [67]

Cross-Examination

By Mr. Skeel:

Q. Mr. Wild, there was a change order put through, was there not, requesting Mr. Duby to perform other and additional work than called for by the contract? A. That is right.

Q. And that change order was dated when?

A. The change order was dated, I believe it was November 4th.

Q. That is my understanding of the date of it. Now, do you know what date that change order was actually given to Mr. Duby?

A. I don't know that.

Q. Would you deny that it was given to him on any date other than December 15, 1944?

A. I would be prone to doubt that.

Q. Would you deny it?

A. I would not deny it, no.

Q. As a matter of fact, Mr. Duby was continually asking for extensions of time and for extra compensation because of all of the difficulties that he ran into, was he not? A. Yes.

Q. And he started asking for those extensions of

(Testimony of Fred Wild.)

time late in November or early December, did he not? A. Very possible. [68]

Q. As a matter of fact, no extension of time was ever given to him at all except in connection with the Change Order No. 1 which required him to do some other and additional work, is that correct?

A. That is right.

Q. So that no extension of time was ever given to him for the performance of his regular contract?

A. I would interpret that he would have 46 days to finish his regular contract also; that is, the 16 days additional allowed him by the equalization order would also be extended to cover any other work he had.

Q. Yes, but the 16 days extension of time was given in connection with the additional work?

A. That is right.

Q. Were you familiar with the difficulties and troubles Mr. Duby was having out there?

A. Yes, I did know of them to some extent.

Q. You were out to the work from time to time, or every other day or so?

A. No, sir, I was out there just occasionally. As I mentioned before, I am with the—I was with the engineering unit and the engineering phase was over, more or less, and it was under construction at the time, more or less as an observer.

Q. Did you know and hear about it when he struck all [69] this difficulty with the quicksand?

A. I heard of that, yes.

(Testimony of Fred Wild.)

Q. And when his equipment got bogged down so that he couldn't move it around?

A. Not at the specific time, I couldn't say what particular date I heard of it, but I knew of it at this time.

Q. Did you know that he had to hire clamshell equipment to stand by steadily so as to be able to haul tractors and other equipment out of the mud and quicksand?

A. I did not know that until I read the record.

Q. Do you know what the purpose of this change order was given for?

A. I believe it was for extra grading.

Q. Did you know that Mr. Duby was constantly asking permission to start his excavations at the lower end of the drainage canal rather than at the upper end so that he wouldn't have to fight the water all the way?

A. I did not know that. It wouldn't concern us.

Q. And that request was never granted to your knowledge, was it? A. No, I don't know.

Q. I believe you testified that the contract granted to Mr. Duby was \$6602.70?

A. I believe that was the basic contract.

Q. Did you know or did anyone tell you that at the time [70] Mr. Duby finished completion of that contract he expended \$17,687?

A. I did not know that until a few days ago.

Q. A few days ago you were reviewing the file?

A. Reviewing the file.

(Testimony of Fred Wild.)

Q. And found Mr. Duby's letters so advising?

A. Of the extra expense.

Q. And Mr. Duby's letters setting forth his requests for time and requests for additional compensation?

A. I remember that more or less at the time it happened, but I did not remember seeing the figures before.

Q. Were you advised that there were considerable unpaid labor and material men in connection with that job? A. No.

Q. Or were you advised that Continental Casualty Company on their payment bond paid the full amount of that bond into this court?

A. No.

Q. Did you have anything to do with the planning of the grading and paving of the runways of Bow Lake Airport? A. Yes, I did.

Q. I will ask you if the delay in the performance of Mr. Duby's contract in any way delayed the performance of that leveling and paving of the runways?

A. It was not connected in any way. [71]

Q. Not connected in any way? A. No.

Q. Do you know of any other contract or construction job that was delayed as a result of Mr. Duby's delay in the performance of his contract?

A. No other construction job that I know of.

Q. Do you know of any actual damages suffered by the United States Government resulting from Mr. Duby's delay?

(Testimony of Fred Wild.)

A. None other than the standby time of our inspection crew.

Mr. Skeel: That is all, your Honor.

Q. (By Mr. Parrott): Mr. Wild, are you familiar with the letter signed by C. M. Estep, Contract and Service Officer—it is identified as Exhibit No. 7—a letter dated August 11, 1945?

A. I read it this morning. I remember it from then, I believe.

Q. Is that the first time you ever saw the letter, to your recollection?

A. No, I have seen it before.

Q. Was that letter received in your office, according to your best judgment, within reasonable mailing time after August 11, 1945?

A. I do not know that. I do not know the date of that letter, either. [72]

Q. I am just giving you the date of the letter. As far as you know, is there any reason you know of why that letter would not have been received in the ordinary course of the mail?

A. I know of no reason.

Q. I would like you to read a portion of the letter? This letter discusses this check dam contract; and the last paragraph: "Under the circumstances, therefore, it is suggested that the contracting officer's statement of facts, together with all pertinent papers in the case, be forwarded through the usual channels to the General Accounting Office for settlement. For the information of the General Account-

(Testimony of Fred Wild.)

ing Office your letter of transmittal should indicate the name of the receiver, if known * * *'

Will you please take that letter, and reading the letter in the light of your knowledge and experience in these transactions, tell us what that refers to?

A. That refers—the letter refers generally to this Pat Duby contract.

Q. Did you know that Mr. Duby was adjudged bankrupt?

A. I did not know that until very recently.

Q. You read that letter?

A. I read the letter, yes.

Q. But you personally didn't know about that time—in other words, I will state for your information Mr. Duby was [73] adjudged bankrupt on the 30th day of June, 1945, and this letter was written one month and eleven days thereafter. You can't refresh your recollection to an extent which will enable you to know what he was talking about when he was talking about presenting this account to a receiver?

A. The word "receiver" here, if I may say, might have been someone that was requesting payment for bills. As I read it now and with the light of the advice on bankruptcy, I see where it would be receiver in bankruptcy.

Q. So according to the trend and substance of that letter the Civil Aeronautics Authority were considering the question of their rights and presenting the matter of their claim to the receiver.

(Testimony of Fred Wild.)

That is the purport as far as you can see now of that letter, is it not? A. Yes.

Mr. Parrott: That is all.

Mr. Skeel: Just one other question.

Q. (By Mr. Skeel): Did Mr. Duby's progress payments go through your office?

A. No, they did not.

Q. Do you have any record of payments as made to him? A. I don't have any record, no.

Mr. Skeel: That is all. [74]

Mr. Belcher: I take it it will be admitted by both the defendants that neither the Civil Aeronautics Authority nor the United States of America filed any claim in the bankruptcy proceedings arising out of this contract?

Mr. Parrott: I don't think they did.

Mr. Skeel: I think that is true.

Mr. Parrott: But they did have actual notice of the pendency of the bankruptcy, that is what this letter develops.

Mr. Belcher: The bankruptcy file is here. I would like counsel to examine it and agree if he can that no such claim was filed.

Mr. Parrott: I will say there was no claim filed by the Civil Aeronautics Authority on account of this transaction.

Mr. Belcher: Or by anybody in its behalf.

The Court: I do not know yet what the agreement, if any, is. I heard two statements made by counsel and I didn't hear any final response, and I do not know what counsel intend to agree.

(Testimony of Fred Wild.)

Mr. Belcher: I think the gist of what we were talking about, if your Honor please——

The Court: If you wish a stipulation you should state what you wish stipulated and ask the other counsel [75] if he agrees to it.

Mr. Belcher: I understood him to say he agreed to it.

Mr. Parrott: Yes, I will agree that the Civil Aeronautics Authority never filed any claim in the bankruptcy proceedings involving Mr. Duby.

The Court: The last question was and that nobody else on behalf of the CAA did either. I believe that is what he said in his last question.

Mr. Parrott: I am satisfied that that is true, but I think I would prefer to examine the claim file. We have here what is generally known as the referee's court file, but we do not have the claim file.

The Court: How long will it take you to find out from the claim file?

Mr. Parrott: About five minutes.

The Court: Do you wish to submit a claim file to him, Mr. Belcher?

Mr. Belcher: Yes, your Honor.

The Court: You can do that at the next recess.

Mr. Belcher: I want to offer, if your Honor please, for your Honor's consideration the entire file in the bankruptcy proceedings No. 37366, together with the claim files, which are a separate file, according to the notes in the file.

The Court: Do you wish it marked? [76]

Mr. Belcher: Yes, if your Honor please, I do.

(Testimony of Fred Wild.)

(Bankruptcy file No. 37366 marked Plaintiff's Exhibit 11 for identification.)

Mr. Belcher: I want to offer that file.

The Court: Do you have any objection?

Mr. Skeel: I have no objection.

Mr. Parrott: No objection, if your Honor please.

The Court: Plaintiff's Exhibit 11 is now admitted.

(Plaintiff's Exhibit 11 received in evidence.)

The Court: Are all counsel agreed as to what it is? Will you state for the record what it is?

Mr. Belcher: It is the petition and all proceedings in the bankruptcy court and the discharge of the bankrupt as shown by the order made by this Court, together with all of the claims that were filed in the bankrupt estate.

Mr. Skeel: I do not believe the claims are in the file which the Court has.

Mr. Belcher: I have permission, if your Honor please, to supply the claims from the clerk's office in a few moments.

The Court: You may do that at your first opportunity.

Mr. Belcher: I understand counsel are through with cross-examination of this witness.

The Court: You may step down. Call plaintiff's next witness. [77]

PAT DUBY

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Belcher:

(Photostatic copy of letter of 10-4-44, marked Plaintiff's Exhibit 12 for identification.)

Q. Will you state your name, please?

A. Pat Duby.

Q. Where do you live, Mr. Duby?

A. I live at 1535 Bellevue.

Q. You are one of the defendants in this case, are you not? A. Yes, sir.

Q. Now, Mr. Duby, you have been handed what has been marked for identification Plaintiff's Exhibit 12. Will you examine that, please, and see if you ever saw it before, or the original of it?

A. Yes, sir.

Q. You received that letter, did you?

The Court: I didn't hear his answer.

Q. What was your answer? A. Yes, sir.

Mr. Belcher: I want to offer Exhibit 12.

Mr. Skeel: Would you have him describe [78] it?

Q. What is it, Mr. Duby?

A. It is a letter of notification to proceed with the work.

Q. What is the date of it?

A. Dated October 4th.

Q. October 4, 1944? A. Yes, sir.

(Testimony of Pat Duby.)

The Court: 1944 or 1945?

The Witness: 1944.

(Photostatic copy of letter of 1-16-45, marked Plaintiff's Exhibit 13 for identification.)

Q. You have been handed what has been marked for identification Plaintiff's Exhibit 13. Do you remember seeing the original of which that purports to be a photostatic copy? A. Yes, sir.

Q. What is it, Mr. Duby?

A. It is Rider No. 1 of the contract.

Q. What is the date of the letter?

A. Dated January 16th.

Q. Written by you? A. Yes, sir.

Q. January 16, 1945? A. Yes, sir.

Mr. Belcher: I want to offer that in evidence.

Mr. Skeel: No objection. [79]

The Court: It is now admitted.

(Plaintiff's Exhibit 13 received in evidence.)

(Photostatic copy of letter of 1-20-45, marked Plaintiff's Exhibit 14 for identification.)

Q. You are being handed what has been marked for identification as Plaintiff's Exhibit 14, which purports to be a photostatic copy of something. Did you ever see the original of that before?

A. I didn't receive it, I wrote it.

Q. You wrote it? A. Yes, sir.

Q. Did you ever see it before? You wrote the letter? What is the date of the letter?

A. January 20, 1944.

(Testimony of Pat Duby.)

Q. 1945? A. 1945.

Mr. Belcher: I want to offer that exhibit.

Mr. Skeel: No objection.

The Court: Admitted.

(Plaintiff's Exhibit 14 received in evidence.)

Mr. Belcher: I think perhaps we can save considerable time, if your Honor will permit it, I will have these other three fastened together. [80]

The Court: You may do that. Let it be marked Plaintiff's Exhibit 15.

(Photostatic copies of letters marked Plaintiff's Exhibits 15(a), 15(b) and 15(c) for identification.)

The Court: You should expedite the examination of the witness. He is not comfortable on account of his bad cold.

Q. (By Mr. Belcher): You have been handed three sheets of paper marked for identification as Plaintiff's Exhibits 15(a), (b) and (c).

A. Yes, sir.

Q. They purport to be photostatic copies of letters. Are you familiar with the originals of those? A. Yes, sir.

Q. Were the letters written by you?

A. Yes, sir.

Q. To whom? A. To various—

Q. Refer to 15(a).

A. 15(a) was written—

Q. What was the date of that?

A. February 2, 1945.

(Testimony of Pat Duby.)

Q. 15(b) ?

A. March 20, 1945, to Mr. Wilson.

Q. And 15(c) ? [81]

A. April 3, 1945, to Mr. Wilson.

Mr. Belcher: I want to offer these in evidence.

Mr. Skeel: No objection to 15(a), (b) and (c).

The Court: Admitted.

(Plaintiff's Exhibits 15(a), (b) and (c) received in evidence.)

The Witness: What about this other one ?

(Photostatic copy of letter of 5-10-45 marked Plaintiff's Exhibit 16 for identification.)

The Court: Do you offer 15(a), (b) and (c) ?

Mr. Belcher: Yes, your Honor.

Mr. Skeel: No objection, but I thought you were offering (d) also.

The Court: There is another one which you might think is (d) which has been marked Plaintiff's Exhibit 16.

Q. (By Mr. Belcher): You have been handed what has been marked for identification as Plaintiff's Exhibit 16. Did you ever see the original of that ?

A. Yes, sir.

Q. It is a letter written by you, is it not ?

A. Yes, sir.

Q. What is the date ?

A. May 10, 1945.

Mr. Belcher: I want to offer No. 16.

Mr. Skeel: No objection. [82]

The Court: It is admitted. It is a dark background. It is intended to be a white one and the

(Testimony of Pat Duby.)

photographic process was deficient in some way, but the Court will admit it because it is intended to be a white background. It is admitted.

(Plaintiff's Exhibit 16 received in evidence.)

(Photostatic copy of letter of 10-31-46 marked Plaintiff's Exhibit 17 for identification.)

Mr. Belcher: Exhibit 17, if your Honor please, purports to be a photostatic copy of a letter written by Mr. Henry W. Parrott, which Mr. Parrott, I understand, is agreeable may be introduced in evidence.

Mr. Parrott: It is all right with me.

Mr. Belcher: I offer 17.

The Court: It is now admitted.

(Plaintiff's Exhibit 17 received in evidence.)

Mr. Belcher: In the interests of saving time, your Honor, may I have four photostatic copies affecting the Continental Casualty Company marked together?

The Court: Let them be marked Plaintiff's Exhibits 18(a), (b), (c) and (d).

(Photostatic copies of letters marked Plaintiff's Exhibits 18(a), (b), (c) and (d) for identification.) [83]

Mr. Belcher: I think that is all I need Mr. Duby for.

The Court: Let's dispose of this last marked

(Testimony of Pat Duby.)

exhibit before we excuse him from the stand. When the clerk marks them, will you give the date of (a), (b), (c) and (d). Would that help you identify them?

Mr. Skeel: Yes, your Honor.

The Clerk: 18(a) is April 23, 1945; 18(b) is September 11, 1946; 18(c) is October 9, 1946; and 18(d) is April 25, 1947.

Mr. Belcher: In conference with counsel representing the Continental Casualty Company, if your Honor please, it is stipulated that the letter from the Continental Casualty Company to D. S. Anderson, Chief, Contract and Service Branch of the Department of Commerce, Civil Aeronautics Administration, Seattle 14, Washington, with relation to Bond No. 904912, the letter being dated April 23, 1945, may be admitted in evidence as Plaintiff's Exhibit 18(a).

The Court: A similar stipulation relating to (b), described by you as what kind of a letter?

Mr. Belcher: A letter addressed to D. S. Anderson, Chief, Contract and Service Branch, Department of Commerce, Civil Aeronautics Administration, at Seattle, from Warner M. Bruce, Superintendent, Continental Casualty Company, dated April 23, 1945. [84]

Mr. Skeel: That is (a)?

The Court: I understood you to say in effect that (b) is covered by a similar stipulation, and will you follow that up by describing what (b) is?

Mr. Belcher: (b) is a letter from Carlin Mason,

('Testimony of Pat Duby.)

Claims Reviewer for the Comptroller General of the United States, addressed to the Continental Casualty Company, Northwest Claim Department, 1411 Fourth Avenue Building, Seattle, Washington, dated September 11, 1946.

(c) is a letter on the letterhead of the Continental Casualty Company, dated October 9, 1946, addressed to the General Accounting Office, Claims Division, Washington 25, D. C., to Mr. Carlin Mason, Claims Reviewer, the letter being signed by Warner M. Bruce, Superintendent, Continental Casualty Company.

18(d) is a letter, a photostatic copy of a letter dated April 25, 1947, from the Assistant Comptroller General of the United States, under his file B-64561, addressed to the Continental Casualty Company, Northwest Claim Department, 1411 Fourth Avenue Building, Seattle, Washington, and signed by the Assistant Comptroller General of the United States. The signature is not legible.

I now desire to offer all three of these.

Mr. Skeel: No objection to 18(a), (b), (c) and (d).

The Court: Each of them is now admitted as one exhibit. [85]

(Plaintiff's Exhibits 18 (a), (b), (c) and (d) received in evidence.)

Mr. Belcher: So far as Mr. Duby is concerned, your Honor, we have no further examination.

The Court: Was there anything you wished to

inquire by way of cross-examination within the scope of this inquiry, having in mind that you may wish to call him as defendants' witness?

Mr. Skeel: No, your Honor, I have no questions of Mr. Duby at this time.

The Court: You may step down. Call the next witness.

Mr. Belcher: We rest, your Honor.

The Court: Plaintiff rests. The defendants may proceed.

Mr. Belcher: With this reservation, your Honor, I ask that those portions of the original files of the Aeronautics Administration which have been marked and admitted in evidence, that I may be permitted to substitute white background photostatic copies in lieu of the originals and withdraw the originals.

Mr. Skeel: I have no objection to that.

The Court: That may be done at counsel's future convenience.

Mr. Belcher: I did not want to stop the trial to do it, your Honor. Before we leave the courtroom I shall [86] substitute them, if that is satisfactory.

Mr. Skeel: That is agreeable.

The Court: If you get a white background photostatic copy of Plaintiff's Exhibit 8, do you wish to reserve the right to offer that?

Mr. Belcher: The trouble is, your Honor, I didn't have that at the time I sent these down to have them rephotostated.

The Court: Has anyone a copy of it?

Mr. Belcher: I would like, if your Honor please, the privilege of withdrawing it for the purpose of having a copy made.

The Court: Notwithstanding the closing of plaintiff's case in chief, is there any objection to that request?

Mr. Skeel: That is Exhibit—

The Court: Plaintiff's Exhibit 8. It is a certified copy. It has a certificate of some defendant representative attached to it. He wishes to withdraw that for the purpose of making a white photostat of it.

Mr. Skeel: I have no objection.

The Court: That exhibit, identified as Plaintiff's Exhibit 8, is now withdrawn and is returned to counsel who produced it. Take the clerk's marks off of it. The defendants may now proceed.

Mr. Parrott: You may resume the stand, Mr. Duby. [87]

The Court: You have already been sworn, Mr. Duby.

PAT DUBY

called as a witness by and on behalf of defendants, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Parrott:

Mr. Parrott: At this time, if your Honor please, the defendant Pat Duby would like to request that Exhibit 7 be particularly identified also as De-

(Testimony of Pat Duby.)

fendant Duby's exhibit. Has that exhibit been so identified?

The Court: It has been admitted in evidence as Plaintiff's Exhibit 7.

Mr. Parrott: Would it be proper to have that also identified as an exhibit on behalf of defendant Duby? If possible, I would like to have it so endorsed.

The Court: Does anybody object to the defendant making use of that evidence as evidence in the case for all parties litigant?

Mr. Belcher: No, your Honor.

The Court: I am sure all parties litigant in the case may call to their assistance that letter, no matter by which side introduced in evidence.

Mr. Parrott: If your Honor please, we have introduced [88] in evidence particularly the entire file made of the bankruptcy of H. L. Duby, No. 37366 in this court. The defendant has alleged in his answer that he has been granted a discharge in bankruptcy. The formal original order is in the file. Schedule A-3, creditors whose claims are unsecured, is also attached to and is a part of the original bankruptcy file. As to those two portions of the file, I would like to have the same stipulation, that all parties to the proceeding have equal recourse as either the discharge in bankruptcy may assist or not assist them, and the same as to Schedule A-3, which is a schedule of unsecured creditors, and particularly shows the nature of the scheduling of the transaction involving this Bow Lake

(Testimony of Pat Duby.)

Airport, this being the contract we are speaking about.

Mr. Belcher: We have no objection, your Honor.

The Court: Let the record show the attitude of both counsel.

Mr. Skeel: Do I understand or do I not, if your Honor please, that the entire bankruptcy file and all matters therein are now made exhibits so that there need not be any special reference or request to introduce additional items which are already included in there?

The Court: Plaintiff's Exhibit 11 has been received in evidence, and I understand it is the file of the [89] Clerk of this Court in the bankruptcy proceedings and contains all papers in those proceedings which were filed and are now on file in the Clerk's office of this Court relating to the bankrupt therein named.

Mr. Parrott: And they are all in evidence.

The Court: They are all in evidence. So far as I know, even if someone objected to defendant using whatever evidence there is in the file for the defendant's benefit, the objection would be without avail. I do not understand that the Court may not consider as evidence in favor of some other party documents or testimony introduced on behalf of a different party to the litigation.

Q. (By Mr. Parrott): You are H. L. Duby, named as a defendant in this action?

A. It is Pat Duby in the action, isn't it?

Q. Is Pat Duby and H. L. Duby, who is men-

(Testimony of Pat Duby.)

tioned in the bankruptcy proceedings No. 37366 that we have been discussing, are you one and the same person? A. Yes, sir.

Q. Pat Duby, as you did business, was more or less of an assumed name, was it?

A. It is a name I have used all my life.

Q. You have used the name of Pat Duby all your life, but you were christened H. L. Duby, is that right? [90]

A. I was christened H. L. Duby.

Q. But H. L. Duby and Pat Duby are the same person? A. That is right, sir.

Q. And Pat Duby is the same Duby that was discharged in this bankruptcy proceeding?

A. Yes, sir.

Q. Will you be kind enough to tell the Court the circumstances surrounding this operation at Bow Lake, starting with the original inception of how your attention was called to it and the conversations you had with different representatives of the Government as to its original inception?

A. Well, after five years some of that stuff is bound to slip my mind, but I have got kind of a general idea. We went out to look the job over with an estimator, Mr. Newberry. We inquired and found out all we could about it. There was just a little trickle of water; we bid it that way. We got ready to do the job; there was a river going down through there. The job was let.

The Court: How much time elapsed between those two occasions just mentioned by you?

(Testimony of Pat Duby.)

The Witness: That was about the 15th of August we looked to job over, and they gave it to us on October 16, when the rainy season had started. We moved our equipment in there and struck nothing but mud, and the superintendent and I put in 24 hours a day there for [91] four months trying to bring the thing out, because I didn't want to give up.

Q. (By Mr. Parrott): Did anyone from the Aeronautics Authority accompany you or show you around?

A. At the particular time we went down there, there was no one available.

Q. I beg your pardon?

A. At the particular time we went down to look it over, there was no one available. The man that had been there—I think we were there the day after. I met Mr. Hall shortly after that and he told me we were there the day after we should have been.

Q. Who was the first man connected with the Aeronautics Authority that you ever saw at the place? A. Mr. Affleck.

Q. How long was that after you made your bid?

A. Well, from about the middle of August until the 6th of October. I didn't meet Mr. Affleck until after I had went on the job.

Q. Was Mr. Hall on that job when you first started to work there?

A. I didn't meet Mr. Hall until quite a while later. Mr. Affleck was on the job when I went there,

(Testimony of Pat Duby.)

and Mr. Hall came in the picture shortly after, I would say a month after, perhaps. [92]

Q. You think about a month after?

A. I think so.

Q. And that first month all your dealings, practically all your dealings so far as the Civil Aeronautics Authority might be concerned, were with Mr. Affleck? A. That is right.

Q. Who was the first one that you approached after you found the conditions as they were when you started to work?

A. I approached Mr. Hall and Mr. Affleck both. I met them both by the time I got into the conditions.

Q. What authority did Mr. Affleck appear to have there?

A. He seemed to be the resident engineer. We called them inspectors, from our point of view.

Q. Just tell the Court what you found there when you started to do this work, what you found the situation to be.

A. We got into the ground a couple of feet and there was no bottom to it. Everything we put in there would go right on through, and Mr. Affleck seemed to be quite sympathetic with the deal, and we thought we could work something out.

I went down and met Mr. Frazer, I believe his name is, at the office and we talked it over. Shortly after that Mr. Affleck left, I do not know just exactly what time. He had two or three other boys on

(Testimony of Pat Duby.)

the job. They were very helpful, but they couldn't do us much good. They couldn't [93] stop the mud. By the time we got this thing in operation, the rain was poring down in torrents. I think the records will bear me out, that they had more rain that year than they ever had in this country, and we had a regular river to contend with.

Q. How deep was—what was this undersurface condition generally?

A. It was a peat bog and a quicksand, and you could throw gravel in there by the truckload and never see it again.

Q. You could do what?

A. You could throw gravel in by the truckload and never see it again. It would go clear out of sight, trying to build up a base you could work on, and that is what cost all the money, a good deal of the money.

Q. In that operation, which end did you have to work from? A. Worked from the top end.

Q. By the way, how far was this operation from the airport proper?

A. Approximately half a mile.

Q. It was kind of downgrade, wasn't it, from the airport? A. A gradual slope, yes.

Q. That was sloping towards Puget Sound?

A. Yes, sir. I believe if they had allowed us that modification order in time we might have saved quite a little time on the job and a few other things, because if we [94] started at the bottom we could

(Testimony of Pat Duby.)

have kept the water out of our way, but we started at the top and we was in the water all the time.

Q. What, if any, effort did you make to try to change that system of operating?

A. Couldn't change it until we had the modification order.

Q. You suggested it, did you?

A. That is where I got the modification order, I believe, sir.

Q. What would you say was the thickness of this sand condition you spoke about?

A. It would vary from 2 feet to 20. It was in several places in this project. Some places it would be—we could take care of it in a couple of feet. Other places, we would go down 10 or 15 feet.

Q. When you took this contract, started on the work, from the indications as you saw them on the ground what would be the total depth that you would have to go in any of the work that you were to perform?

A. Ordinary depth, I think the biggest depth of any would be approximately 10 feet. I think Mr. Hall would possibly be better.

Q. Would that be at the ends of this main dam or what?

A. No, that would be all the dams going down, and the [95] further down you went the less depth you had to go to and the more quicksand you run into.

Q. Under normal conditions, was there anything to indicate in carrying on this work that it would

(Testimony of Pat Duby.)

ever be necessary for you to bring in this clamshell?

A. Nothing at all on the ordinary—we could have done it with a bulldozer under ordinary conditions.

Q. What is a clamshell? You say in your letter of January 20, 1945, one of the exhibits here, that your expense for clamshell standing by on these excavations alone was \$3592.41. When you made up that figure, when you wrote that letter, was that the correct figure?

A. That was absolutely correct. Everything on the job was costed in the office by the girl.

Q. Just what did that machine do, that clamshell?

A. Well, it put a \$35 man to work and a \$20 man to work watching us dig the dozer out so we could use the dozer, and various other things of that sort. It was really rough.

Q. Was it necessary to have this standby machine there? A. Yes, sir.

Q. What do you mean by a \$35 man?

A. The engineer was drawing, with his overtime, \$35 a day.

Q. That was the engineer on the clamshell?

A. And the oiler would draw \$20. [96]

Q. Who did you rent the clamshell from?

A. I believe it was Nels Hedeen.

Q. I believe you said that there was nothing anticipated, and you would not normally be required to undergo an item of expense like this \$3592.41 for this clamshell business, is that right?

(Testimony of Pat Duby.)

A. It wouldn't be anticipated, no, sir.

Q. You say here that you had a pumping expense of \$1799.59. Will you explain that to the Court, please?

A. Well, working from the top down, we had so much water we had to put in big pumps, so the pumpers from the union worked three shifts.

Q. That pumping operation was a three-shift operation? A. Yes, sir.

Q. You had to keep ahead of the water or you couldn't do anything at all, is that right?

A. We had to keep it down so we could let something stop there.

Q. From the condition of that country at the time you examined it and made the bid, was there anything to indicate any such abnormal expense as that?

A. Nothing whatever. There was kind of a ravine cut where this creek ran down. Some places it was 6 or 8 feet deep, depending on the level of the ground, about 6 feet deep, and there was just a little trickle of water running [97] down the middle of it. It looked like a gravel bottom from where we were. We didn't get down in it, we were more or less dressed up on those days.

Q. You have an item of \$1038.75 for a bulldozer. Was that an anticipated expense at the time of the making of this bid?

A. No, it wasn't. All the concrete had to be pulled in with a bulldozer because of the soil conditions.

(Testimony of Pat Duby.)

Q. And the items that I have mentioned, under anything like normal conditions would it have been necessary to use a bulldozer to haul the concrete in?

A. No, sir, the concrete company would have delivered it and poured in right in the dam.

Q. They pour it right there under normal conditions? A. Yes, sir.

Q. And the way it was you had to have this bulldozer to handle it? A. That is right.

Mr. Belcher: I don't want to object too much, your Honor, but it seems to me this is an unusual way for counsel conducting the examination.

The Court: I understand that this is in pursuance of the allegations of the affirmative defenses which are still before the Court. I do not know what the outturn will be respecting those affirmative defenses, but [98] the objection is overruled.

Q. What assurance were you given by Mr. Affleck as to what you could expect the Civil Aeronautics Authority to do if you continued with the work, that is, after you learned of these conditions?

A. We had just finished a job at McChord Field, and Mr. Affleck seemed to be prejudiced in our favor, and he thought most anything we asked for we would get that was reasonable, like extension of time and more money. We proceeded under the same idea. We got more money from McChord for the same setup exactly.

Q. You asked for various extensions of time and they were not granted, is that true?

(Testimony of Pat Duby.)

A. They weren't turned down, either, until after the thing was finished.

Q. In construing the contract which you signed, there are provisions in there that indicate that if you are delayed because of an act of God or weather conditions or circumstances beyond your control or other conditions that could not be discovered by the observation or use of reasonable foresight, that a condition like that would be corrected and you would not be penalized for it, is that correct?

A. That is the impression I had, sir.

Q. As you read the contract, that is what it called for, wasn't it? [99]

A. Oh, yes. I thought you meant my conversation.

Mr. Parrott: I think that is all.

Q. (By Mr. Skeel): Mr. Duby, as shown by Exhibit 14, which sets forth that an itemized bill in triplicate shows that you expended \$17,687.02 on this job, is that the correct figure of your expenditures?

A. Yes, sir.

Q. Total overall expenditures?

A. Yes, sir.

Q. Does that figure include the amount which Continental Casualty Company as surety on your payment bond had also paid for labor and material claims?

A. No. They are bonded only for one-half, isn't it, of the original contract.

Q. So that any amount the Continental Casualty

(Testimony of Pat Duby.)

Company paid under its payment bond is in addition to this \$17,687? A. That is right.

Q. Now, Mr. Duby, in your letter of May 10, 1945, which is Exhibit 16, you stated in part as follows: "As to the \$20.00 per day penalty, we finished the main part of the work on Jan. 12, and had to wait until the mud dried sufficiently to allow us to clean up, which was April 2. The mud was so sloopy we could not get machinery in until that time, which would make the penalty time 53 days instead [100] of 133 as shown on the statement." Is that substantially correct? A. That is.

Q. What was the stage of the completion of your contract on January 12, 1945?

A. On January 12, everything was in excepting the cleanup, and we had to do some filling on the berms.

Q. On January 12, 1945—

A. And clear out some debris below 200th Street.

Q. On January 12, 1945, the contract was substantially completed except for cleanup, is that correct? A. That is right.

Q. In connection with this modification order, Change Order No. 1, which was dated November 4, 1944, when was that given or delivered to you?

A. It was delivered to me about the 15th of December. I have the record on it someplace.

Q. And what did Change Order No. 1 do? How did it change your work or help you?

A. When we had the project about done, the water wouldn't run off because it didn't have any

(Testimony of Pat Duby.)

place to go. The project was lower than the country so we had to clear the drainage canal below to let the water out.

Q. Do I understand the effect of Change Order 1 was to allow you to work in the bottom so as to keep out of the way [101] of the oncoming water instead of the top where you had to fight it all the way? A. Yes, sir.

Q. Is that what you stated a short while ago in your testimony, that you kept requesting the Government to allow you to start at the other end so as to avoid all this water? A. Yes, sir.

Q. Do you know where all this water came from?

A. It came off of that Bow Lake airfield.

Q. Was it rain or was it in the nature of underground springs?

A. Oh, no, it was all rain, practically all rain. There might have been some underground springs, but if there were, they were not noticeable.

Q. All of your records in connection with this matter have been lost or destroyed, is that correct?

A. Yes, sir.

Q. You gave them all to the trustee in bankruptcy at the time you went into bankruptcy?

A. Yes, sir.

Q. And you were never able to get them back, is that correct? A. That is right.

Q. Do you recall, Mr. Duby, when you received progress payments in connection with the performance of this contract [102] from the Government?

A. We received them around the 25th of every

(Testimony of Pat Duby.)

month following the month the work was performed. They came from Washington, mailed direct.

Q. I will ask you what percentage of the entire contract price you received after December 1, 1944?

A. I think our first payment was in December.

Q. The first payment received under the contract was in December, 1944?

A. I think it was, I couldn't say offhand.

Q. So that the entire contract price and all moneys which you received thereunder were received subsequent to December 1, 1944?

A. I am pretty sure, but I don't know about the—

Q. And starting then in December you received a sum each month, December, January?

A. That is right, whatever the engineer's estimate amounted to.

Q. Did you receive a sum each month following December, 1944? A. Yes, sir.

Mr. Skeel: I have no further questions.

Cross-Examination

By Mr. Belcher:

Q. When did you first discover that you were running [103] into what you claimed to be unusual conditions after you entered upon the work?

A. About ten days after we started the job.

Q. Do you remember what day you started the job?

A. We started it about the 10th of October, approximately.

(Testimony of Pat Duby.)

Q. 10th of October? A. Yes, sir.

Q. And under your contract you would have to have that work done by the 10th of November, wouldn't you? A. Yes, sir.

Q. And isn't it a fact that in October, 1944, to be exact, the 31st of October, 1944, the Civil Aeronautics Authority wrote you a letter which has been introduced here as Exhibit 9 in which it is said to you: "Your attention is called to the fact that the time for completion of the work will expire November 4, 1944, and that to date, practically no progress has been made." You got that letter?

A. Yes, sir.

Q. Was that the truth or wasn't it?

A. It was the truth no progress had been made. We started in in the mud and we stayed there.

Q. And in that letter they further said: "It is further pointed out that due to the nature of the work, its completion becomes increasingly difficult as the season advances and that the Government's interest requires that construction be [104] completed at the earliest possible time." Now, up to that time you hadn't had any rain at all, had you?

A. Yes, sir, we had.

Q. When did you start to suffer from excessive rains?

A. We started suffering the minute we moved on the job, sir.

Q. When?

A. It started raining the minute we moved on the job, kept it up steady.

(Testimony of Pat Duby.)

Q. Then this further statement was made by Mr. Wilson, the administrative officer for the Civil Aeronautics Authority, in that letter of October 31: "You are therefore advised that if facts demonstrating your intention and ability to successfully complete the contract within a reasonable time are not presented to this office prior to November 4, 1944, it is our intention to terminate your right to proceed with the work in accordance with Article Nine of the contract." A. Yes, sir.

Q. Did you go and see Mr. Wilson after that?

A. I did.

Q. What was the result of that?

A. I must have stayed on there, I lost all the money I had.

Q. You assured him, as a matter of fact, that you could complete the contract? [105]

A. I did. I completed the contract.

Q. And in that same letter Mr. Wilson said to you: "In the event your right to proceed is terminated, the Government will take over and complete the work and you and your sureties will become liable for any excess costs occasioned the Government thereby" and you acknowledged receipt of that and your acknowledgment is on the Exhibit 9? A. Yes, sir.

Q. Mr. Duby, you knew, did you not, that all the time that you were working on this project the Government or the Civil Aeronautics Authority had somebody there supervising the work?

A. And sympathizing with me.

(Testimony of Pat Duby.)

Q. You knew that the Government was put to a considerable expense in the overhead for supervision as well as their work in the office?

A. I don't believe they had any additional supervision.

Q. You knew, didn't you, that that figure—

The Court: How much more time do you need?

Mr. Belcher: I will be through in one or two questions, your Honor.

The Court: Proceed.

Q. (By Mr. Belcher): Mr. Duby, you knew that the expense to the Government of this supervision far exceeded the sum of \$20.00 per day, didn't you? [106] A. I do not, sir.

Q. What?

A. I didn't know that and I don't know it yet.

Q. You knew there was at least one engineer supervising your work and an additional number of crew members? A. No.

Q. You knew that there was considerable office work to be done in connection with this contract, did you not?

A. They had their force, didn't they? They didn't have any additional help on my account.

Q. Is it your opinion, Mr. Duby, that at the time you entered into this contract and agreed that if you did not complete the work within the time allotted by paragraph 1 of the contract, which was 30 days, and which had been extended, that the \$20.00 per day which you agreed to pay for every day over and above the 46 days you were engaged

(Testimony of Pat Duby.)

in this work didn't begin to compensate the Government for the expense it was put to in the supervision of this job, is that true?

A. No, I don't know anything about how they handled their affairs at all.

Mr. Belcher: That is all.

Redirect Examination

By Mr. Parrott:

Q. You never heard of the Government being put to any [107] expense, did you?

A. I don't know how they handled their accounting.

Q. Was there anything you know of where they were put to any extra expense?

A. They had one inspector down there some of the time, but he had other jobs to inspect, too.

Q. That was while you were doing the work, wasn't it? A. Yes, sir.

Q. That wasn't during this overtime, not over this period there was nothing going on there? There was no inspector there, was there?

A. I don't believe there was. I don't know for sure.

Q. As far as you know, was there anybody there in March?

A. Nobody there after we poured the last of the dam until we cleaned up.

The Court: The Court will have to continue this trial. This trial is continued until Tuesday, the first day of May, at 10 o'clock in the forenoon or as soon

(Testimony of Pat Duby.)

thereafter as counsel can be heard. I think it would be well for you to have written arguments and citations of authorities in this case prepared at that time.

Mr. Belcher: I will, your Honor. Does Your Honor desire before leaving the courtroom tonight or at some time prior to conclusion of the trial that these copies be substituted? [108]

The Court: I have no preference about that. I think you should do that in the Clerk's office where it is convenient to do it at some time convenient to counsel, and you can arrange that any day that is convenient to counsel. You are excused until May first.

Mr. Belcher: May I say this, your Honor, Exhibit 8, which is the black photostatic copy, I have sent down to have photostated, so it will have a white background. I have the privilege of offering that?

The Court: Yes, you have that reservation already made in the record, I believe.

(At 4:40 o'clock p.m., Tuesday, April 24, 1951, proceedings adjourned until 10:00 o'clock a.m., Tuesday, May 1, 1951.)

May 25, 1951, 2:00 P.M.

The Court: Are counsel and parties ready to proceed with the remaining trial proceedings in the case entitled United States of America, Plaintiff, vs. Pat Duby, doing business as Pat Duby Com-

(Testimony of Pat Duby.)

pany, and Continental Casualty Company, a corporation, Defendants, No. 2211?

Mr. Belcher: We are ready to proceed.

Mr. Skeel: We are ready, your Honor. [109]

Mr. Belcher: I think Mr. Duby was on the stand.

The Court: You will resume the stand, Mr. Duby. You have already been sworn.

Recross-Examination

By Mr. Belcher:

Q. Mr. Duby, I believe you testified on direct examination that you were on the job 24 hours a day and you had to have special equipment, a clamshell and some other special equipment. What was that?

A. Well, we had the clamshell, a couple of dozers.

Q. Was that occasioned by the fact that you had run into quicksand?

A. It was occasioned by the fact that we run into difficulties all the way through and we couldn't handle it with anything else.

Q. As a matter of fact, for this particular job, even under the most favorable conditions, it would be necessary for you to have that equipment on the job to do the work, wouldn't it?

A. No, sir, it would not. You could handle that job with a bulldozer, most of it.

Q. I can't hear you.

A. You could handle the job with a bulldozer alone under ordinary conditions.

(Testimony of Pat Duby.)

Q. Have you the specifications before you? What were [110] the specifications, do you recall?

A. I do not, sir.

Q. Do you remember, Mr. Duby, whether or not among the specifications certain side casting was required?

A. Yes, there was some side casting.

Q. How would you do that without a clamshell?

A. Mr., I have been away from that job for five years. I don't know what had to be done on it now.

Q. You don't know then whether it is a fact that you had to use this clamshell as special equipment because of difficulties?

A. There was very little side casting at all, and all the side casting could have been pushed out with a dozer, I am sure.

Q. What did you do your excavating with?

A. There wasn't any excavating to do in particular, only side.

Q. Isn't it a fact that you had—

A. What little excavating we would have had to have done, we could have got somebody in there on a cost job.

Q. Isn't it a fact that you had this clamshell from the very beginning of the time you started to work? A. No, sir, I did not.

Q. You are sure of that?

A. I am positive of it. [111]

Q. You had a superintendent on the job, didn't you? A. Yes, sir.

Q. Did he work 24 hours a day?

(Testimony of Pat Duby.)

A. He worked about 16.

Q. You wouldn't have had to work 12 or 14 or 16 hours a day or your 24 hours a day had you completed this contract at the time that you agreed to complete it, would you?

A. We didn't figure on it, sir.

Q. You went out and examined the job before you bid on it, didn't you?

A. Didn't you remember that? We had that all out last week.

Q. Just answer my question, please.

A. What was your question?

Q. Read the question, please.

(Last question read by reporter.)

A. I examined the job under favorable conditions, yes, sir.

Q. And you were fully informed as to what you were up against on the contract before you ever made your bid?

A. Not fully informed, no, sir. I had no intimation we were going to have flood waters to contend with.

Q. Couldn't you see that it was in a locality where you might run into flood waters?

A. I don't think anyone could have seen it when I [112] looked the job over.

Q. How much time did you spend in looking over the ground before you made your bid?

A. The estimator made the bid and I looked it

(Testimony of Pat Duby.)

over, and he was out there two or three trips and I was out once.

Q. You went out only once?

A. That is all I went out.

Q. Who was the man who went out in your behalf? A. Mr. Newberry.

Q. He was your superintendent?

A. Estimator.

Q. He didn't report any unusual conditions to you, did he? A. No, sir.

Q. How much time, if you know, did he spend?

A. He spent about a week on it.

Q. He spent about a week on it?

A. Off and on.

Q. And he made a complete report to you as to what he found, didn't he?

A. As to what he found, yes. I made the bid.

Q. Did he make that report in writing?

A. No, sir.

Q. Orally?

A. The only report that was in writing was the bid, and [113] he justified his figures.

Q. And it was after you had had the report made to you by Mr. Newberry that you made your bid? A. Yes, sir.

Q. At that time it wasn't raining, was it?

A. No, sir.

Q. You were notified to proceed in accordance with the awarding of the contract?

A. Yes, sir.

Q. And you did proceed? A. Yes, sir.

(Testimony of Pat Duby.)

Q. When did you first run into difficulty?

A. About a week after we went to work, two or three days.

Q. What if anything did you do with respect to reporting that to the Civil Aeronautics Authority?

A. The engineer on the job knew all about it, sir.

Q. The gentleman who was on the job was Mr. Hall, wasn't it?

A. He wasn't on the job at first.

Q. He wasn't on the job at all?

A. He wasn't on the job at first.

Q. Who was the man who was on the job first?

A. I don't know his name now. Mr. Hall possibly could tell you what his name was. I have forgotten it.

Q. When you signed this contract, Mr. Duby, you read [114] it over, didn't you?

A. Surely.

Q. And each and every part of it?

A. Yes, sir.

Q. And you knew, did you not, that the contract, by Article 9, provided as follows: "If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1 * * *"—which was 30 days, as I recall, is that correct? A. Yes.

Q. " * * * or any extension thereof, * * *"—you were given 16 days extension, were you not?

(Testimony of Pat Duby.)

A. Not on that contract.

Q. That was additional work?

A. Additional work.

Q. “* * * or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government [115] may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event it will be impossible to determine the actual damages for the delay and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: * * *.”

You knew that condition in the contract?

A. Yes, sir.

Q. “Provided, That the right of the contractor

(Testimony of Pat Duby.)

to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes, if the contractor shall [116] within 10 days from the beginning of any such delay (unless the contracting officer, with the approval of the head of the department or his duly authorized representative, shall grant a further period of time prior to the date of final settlement of the contract) notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, * * *."

You were familiar with that? A. Yes, sir.

Q. You started this work on what date, do you recall? A. No, sir.

Q. Would it be October 4, 1944?

A. I don't remember, sir.

Q. And the 30 days would bring it up to November 4, wouldn't it? A. Yes, sir.

Q. You know there wasn't very much rain between October 4 and November 4, 1944, don't you?

(Testimony of Pat Duby.)

A. I know there was considerable rain.

Q. You know what?

A. I know there was considerable rain.

Q. Unprecedented?

A. There has never been known to be as much as they had [117] that year. Everybody said, everyone in the country that is acquainted with the country, said they never had so much rain.

Q. You might be mistaken on that, mightn't you?

A. I could be. I was mistaken when I signed the contract.

Q. If the records of the Weather Bureau show the contrary, you would agree that the weather records were correct, wouldn't you?

A. I suppose I would have to, sir.

Q. As a matter of fact, you didn't run into a great deal of rain until long after the time had expired under your contracts for the completion of this work, isn't that true?

A. No, sir.

Q. It isn't true?

A. I don't think it is, sir.

Q. And you are sure of that?

A. I say I don't think it is, sir. I haven't the Weather Bureau's records.

Q. You know when the rainy season in this territory is, don't you?

A. Well, that particular year I think we had a long one.

Q. What is your best judgment? Was there

(Testimony of Pat Duby.)

more rain in October than there was the year before?

A. That has been five or six years, Mister, and I can't remember how much rain fell or when it fell, but I know we [118] had a terrible tussle.

Q. How many jobs of this type have you done in your experience?

A. Probably five or six.

Q. Five or six? A. Yes, sir.

Q. How many had you done prior to the time you took this contract?

A. That is the last job I did.

Q. This was the first job you did?

A. That is the last job I did. That ended me.

Q. Where were the others?

A. Silver Lake, Mukilteo, Lynn Mountain, McChord Field.

Q. Were they private work or Government work?

A. Government work, Army Engineers.

Q. What department of the Government?

A. Army Engineers.

Q. You had trouble on most of those contracts, didn't you?

A. Didn't have trouble on any of them.

Q. Mr. Duby, where on the project did you contact quickstand?

A. Well, down at the bridge and up at the first weir.

Q. How big a space was that?

A. I beg your pardon?

(Testimony of Pat Duby.)

Q. What size area was it that you ran into where there [119] was quicksand?

A. Possibly a quarter of a mile, I imagine.

Q. And how long was the project altogether?

A. About a quarter of a mile.

Q. Do you mean to say you ran into quicksand throughout the whole operation?

A. We run into quicksand, gravel and sliding conditions.

Q. Which one, quicksand or gravel? Nothing unusual about gravel, is there?

A. No, I guess not.

Q. You hadn't familiarized yourself with the terrain of that country before you took the contract, had you? A. No, sir.

Q. And the fact that you ran into gravel—you didn't expect to run into gravel, is that true?

A. We didn't expect to run into that particular kind of gravel, sir.

Q. Where did this gravel differ from gravel you usually run into?

A. Gravel with a clay mixture can be handled a lot easier than gravel mixed in with this peat and quicksand that you can't handle.

Q. Do you want to be understood that this whole project, the whole length of the project you ran into quicksand mixed with gravel? [120]

A. Most of it, yes, sir.

Q. Could that condition have been observed by you by careful study before you bid?

(Testimony of Pat Duby.)

A. The way I know it now, it could have, but I didn't know it then.

Q. Can you answer my question, please?

The Court: Read the question and answer.

(Last question and answer read by reporter.)

Mr. Belcher: I submit, if your Honor please, that is not responsive.

The Court: Can you answer more directly? Yes or no would be one way of answering it.

The Witness: I don't believe it could.

The Court: Is that the answer, "I don't believe it could"? Did you intend the last statement to be your answer?

The Witness: Yes, sir.

Mr. Belcher: I think that is all.

Redirect Examination

By Mr. Skeel:

Q. Counsel asked you about extensions of time. Did you make any request for extensions of time?

A. Not written requests. We were so tied up with the job that we would tell the engineer in charge, but we didn't have time to sit down and write anything. We were working [121] all the time trying to get the job done.

Q. Did you make oral requests?

A. I did. I howled to everybody that the Civil Aeronautics had about giving us time on the job.

Q. What were their replies?

A. That I should take it up with their office.

(Testimony of Pat Duby.)

Q. Was any encouragement given you that you would receive an extension of time?

A. I believe they told me that I could figure on some extension of time, yes, sir.

Q. Was any extension of time ever given you other than this one extension which was for other and additional work outside of the original contract? A. No, sir.

Q. When you encountered all of these difficulties, quicksand, flood conditions and difficult terrain, did any Government officials give you encouragement to keep on and carry on with the contract?

A. No. The only encouragement I got was I was afraid of Mr. Bruce. I wanted to keep my bond good, that is the reason I stayed there and finished it.

(Application for bond marked Defendant's Exhibit A-1 for identification.)

Q. Mr. Duby, there is handed to you what has been marked for identification as Defendant's Exhibit A-1, which is a [122] bond application purportedly signed by you, directed to Continental Casualty Company, requesting issuance of your bond on this particular job. I direct your attention to the bottom of the last page, and I will ask you if that is your signature. A. Yes, sir.

Mr. Skeel: No further questions.

The Court: Mr. Parrott, do you wish to ask any further questions?

Mr. Parrott: No, your Honor.

(Testimony of Pat Duby.)

The Court: Any further questions, Mr. Belcher?

Mr. Belcher: Nothing further, if your Honor please.

Mr. Skeel: I would offer, if your Honor please, Exhibit A-1.

Mr. Belcher: It is objected to as far as plaintiff is concerned as being merged in the bond already written and is part of the contract that has been introduced in evidence.

Mr. Skeel: You don't understand, counsel. This is only in connection with defendant Continental Casualty Company's cross-complaint against Mr. Duby in the event there is recovery.

Mr. Belcher: If it is not against the plaintiff, we have no objection.

Mr. Skeel: It has no application as to the [123] plaintiff, is not intended as such.

Mr. Parrott: The defendant Duby objects to the introduction of the offered exhibit on the ground that under the facts as pleaded in the case it has no effect as against Mr. Duby.

The Court: The offer is made, as I understand it, as against the defendant Duby in the Continental Casualty Company's cross-action?

Mr. Skeel: Yes, your Honor. This is an action by the United States against Mr. Duby and against Continental Casualty Company. Mr. Duby was the principal on Continental's bond. In the event, and only in the event, the United States is successful in recovering against Continental, Continental has interposed a cross-complaint asking for judgment

(Testimony of Pat Duby.)

over in whatever amount the plaintiff might recover against it.

The Court: Will you repeat expressly the conditions of your offer as between the parties?

Mr. Skeel: Yes, your Honor. Defendant's Exhibit A-1 is offered in evidence solely in connection with defendant Continental Casualty Company's cross-complaint against the defendant Pat Duby, and it is not offered in any manner in connection with the plaintiff.

The Court: Or as defense against plaintiff's cause of action against either of these [124] defendants?

Mr. Skeel: No, it has nothing to do with the defense of Continental.

The Court: Upon those conditions, Defendants' Exhibit A-1 is now admitted. The objections made by Mr. Parrott to the offer are overruled.

(Defendants' Exhibit A-1 received in evidence.)

Q. (By Mr. Parrott): We are submitting to you Plaintiff's Exhibit 11, which constitutes the bankruptcy file in the case of H. L. Duby, doing business as Pat Duby Company, Bankrupt, and referring particularly to a portion of Schedule A-3 as shown in the schedules. Will you please look at the sheet which is presented to you, and about the lower half of the sheet you will find there a reference to your performance contract. Will you please read it?

(Testimony of Pat Duby.)

A. "Bankrupt furnished a performance bond in connection with the Bow Lake Civil Aeronautics Contract. The bond was signed by Continental Casualty Company, 1411 - 4th Avenue Building, Seattle 1, Wash. The bond was for \$3,397.00. Many of the items listed above are covered and protected by the said bond. Continental Casualty Company, 1411 - 4th Avenue Building, Seattle, Washington, is hereby listed as a creditor of the bankrupt with the amount contingent upon liability found against the said company on account of the said bond. The following is a list [125] of claims of creditors * * *"

Mr. Parrott: We wish to refer to and offer Plaintiff's Exhibit 11 as an exhibit on behalf of the defendant Pat Duby, which contains the schedule which has just been read into the record.

The Court: I do not see why it is necessary to readmit something that has already been admitted. It is in evidence in favor of and against every party in the case unless there is some ruling directing otherwise. Do you wish in connection with your inquiry just made of this witness to call attention to certain parts of Plaintiff's Exhibit 11?

Mr. Parrott: I have done so, if your Honor please. If it is considered in evidence for all purposes—

The Court: The Court does, unless and until the Court makes a different direction or places some limitation upon the evidentiary effect of the exhibit.

Mr. Parrott: That is all.

Q. (By Mr. Skeel): Mr. Duby, the statement

(Testimony of Pat Duby.)

which you just read from Schedule A-3 having to do with the bond, that is the matter under which Continental Casualty Company paid the full amount of its bond out to labor and material men, is it not?

A. I don't know what they paid, sir.

Q. What? [126]

A. I don't know what Continental paid. I have no way of knowing that.

Q. You knew Continental paid the full amount of its bond out to laborers and material men as a result of this job, did you not? A. I didn't.

Q. You didn't know that?

A. No, I didn't.

Mr. Skeel: No further questions.

The Court: Any other questions by anyone? Mr. Duby is excused from the witness chair. Call the next witness.

Mr. Parrott: As far as defendant Duby is concerned, defendant Duby will rest.

The Court: Defendant Duby now rests.

WARNER M. BRUCE

called as a witness by and on behalf of defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Skeel:

The Court: Is this witness called as a part of the defendant Continental Casualty's case in chief?

Mr. Skeel: Yes, your Honor. [127]

(Testimony of Warner M. Bruce.)

Q. Will you state your name, please?

A. Warner M. Bruce.

Q. Do you live in Seattle? A. Yes, sir.

Q. By whom are you employed?

A. Continental Casualty Company.

Q. In what capacity?

A. Superintendent of surety underwriting and claims.

Q. In such capacity, have the Duby matters in connection with this Civil Aeronautics job out at Bow Lake passed through your hands?

A. Yes, sir.

Q. You are familiar with that contract?

A. Yes, sir.

Q. And with all happenings thereunder?

A. Yes, sir.

Q. In connection with that contract, Mr. Bruce, did Continental Casualty Company issue bonds for Mr. Duby as principal? A. They did.

Q. And what were the kind and types of bonds issued? A. Performance and payment bonds.

Q. Will you briefly describe the difference between a performance bond and a payment bond?

A. The performance bond is a bond guaranteeing the [128] performance of the contract itself in accordance with its terms, usually for 50 per cent of the contract price, I believe it was in this case. The payment bond is a bond running to the United States for the benefit of labor and material men.

Q. I will ask you whether or not under the payment bond issued to Mr. Duby in connection with

(Testimony of Warner M. Bruce.)

this Bow Lake contract, whether or not Continental Casualty Company did or was required to pay the full amount of that bond into the registry of this Court?

A. The Continental Casualty Company paid the entire amount of the payment bond into the registry of this Court for the purpose of taking care of the labor and material claims that might be established against it.

(Clerk's file 1294 marked Defendant's Exhibit A-2 for identification.)

Q. There is placed in front of you an exhibit marked Defendant's Exhibit A-2 for identification, which is the Clerk of the Court's file in Cause No. 1294, which action was an interpleader action brought by Continental Casualty Company against all labor and material claimants. Is that the action in which Continental paid the full amount of its bond into this Court?

A. Yes, that is correct.

Mr. Belcher: I would like to inquire whether the [129] United States was a party to that action.

Mr. Skeel: They were not, and this is not offered in any manner in connection with the plaintiff's suit here, but only as between the defendant Continental Casualty Company and the defendant Duby, bearing only on the bankruptcy of the defendant Duby. Defendant's Exhibit A-2 is offered in evidence as against defendant Duby only.

The Court: It is admitted.

(Testimony of Warner M. Bruce.)

(Defendant's Exhibit A-2 received in evidence.)

Q. (By Mr. Skeel): Mr. Bruce, I will ask you what is the first time that defendant Continental Casualty Company had any knowledge or notice of any kind of the claim of the United States that the United States Government was making a claim against either Mr. Duby or Continental Casualty Company for delay in the performance of this job?

A. The first notice we had of such a claim was in the form of a letter from the Government to us at our Seattle office, dated September 11, 1946.

Q. I will ask the bailiff to hand you the letter to which you refer, which is Plaintiff's Exhibit 18 (b). Is that the letter to which you were referring?

A. That is the letter to which I referred.

Q. And that is the first notice or knowledge that [130] Continental Casualty Company had that the United States Government was making claim for delay in the performance of Mr. Duby's contract?

A. That is the first notice we received of the claim for delay or anything else.

Q. There has also been handed you Plaintiff's Exhibit 6, which is correspondence—which constitutes two letters, one a letter from yourself to the United States Government, and the other their reply, and I will ask you to state what those letters represent?

(Testimony of Warner M. Bruce.)

A. A letter of March 6, 1945, signed by myself and addressed to the Department of Commerce, Civil Aeronautics Administration, Seattle, was in reference to the Pat Duby contract. Do you wish me to read it?

Q. No. I will ask you if at that time, the date of the letter you now have in your hand, Plaintiff's Exhibit 6, Continental Casualty Company had any knowledge or intimation or notice of any kind that the United States Government was making any claim as a result of delay of Mr. Duby in the performance of his contract?

A. We had no knowledge or notice of that at that time.

Q. And it wasn't until the September 11, 1946, letter that Continental was advised of such claim?

A. That is correct. There are three letters here, by the way. [131]

(Claim of Continental Casualty marked Defendant's Exhibit A-3 for identification.)

Q. Mr. Bruce, there is handed to you Defendant's Exhibit A-3, so marked for identification, which is a certified copy of the claim of Continental Casualty Company as filed in the Duby bankruptcy. I will ask you what that claim was seeking recovery for, what moneys?

A. That claim sought to recover the amount that we had paid into court under the payment bond for the payment of the proved claims of the labor and material claimants on this particular contract.

(Testimony of Warner M. Bruce.)

Q. I will ask you if at the time of signing that claim in the Duby bankruptcy, if you knew or had any knowledge or any intimation of any claim by the United States Government against Continental Casualty Company for damages resulting from delay in the performance of the Duby contract?

A. We had no such notice. This antedated the other, the claim, by some time.

Mr. Skeel: I will ask that Defendant's Exhibit A-3 be admitted.

Mr. Belcher: As far as the United States is concerned, if your Honor please, we object to it on the same grounds.

The Court: Do you offer it against the plaintiff as well as against Duby? [132]

Mr. Skeel: As a matter of fact, your Honor, if the entire bankruptcy file is in evidence, then that claim is already admitted in evidence. I merely had the clerk prepare a certified copy when I was preparing this case for trial.

The Court: Plaintiff's Exhibit 11 is supposed to contain the bankruptcy proceedings in this court. Is that the one in which you would expect to find this claim listed, among other claims?

Mr. Skeel: Yes, your Honor. I was just pointing out that the one I am offering now is in effect already admitted as an exhibit in 11, but I merely thought it proper procedure to introduce the exhibit separately and not as a bulk file.

The Court: Is there any objection?

Mr. Belcher: No objection.

(Testimony of Warner M. Bruce.)

The Court: Defendant's Exhibit A-3 is now admitted.

(Defendant's Exhibit A-3 received in evidence.)

Mr. Skeel: No further questions.

The Court: Are there any questions by the defendant Duby's counsel?

Mr. Parrott: No, your Honor.

The Court: Are there any questions by plaintiff's counsel of this witness? [133]

Cross-Examination

By Mr. Belcher:

Q. I understood you to say, Mr. Bruce, that the first notice that the Continental Casualty had of any claim of the United States for delay was in 1946?

A. The letter of September 11, 1946, is the only one I have a record of.

Q. Under what provision of the contract do you claim that notice to you was necessary?

Mr. Skeel: I object to that, if your Honor please, as calling for a conclusion.

Mr. Belcher: I would like somebody to point out to me some provision of the contract that says we must notify the surety.

The Court: The objection is overruled. The witness may answer, if he can.

A. I am not familiar with the terms of the con-

(Testimony of Warner M. Bruce.)

tract that might or might not require notice. I merely state that the first notice I received of the claim was on September 11, 1946.

Q. Is it customary for your company on a performance bond not to keep in contact with your principal to determine whether or not he is fulfilling the terms of his contract?

A. It would be, if not impossible——

Q. You can answer the question without any explanation. [134] You can explain later.

The Court: Answer the question yes or no. If it requires explanation, that is another matter.

The Witness: I would have to say no, but I would have to qualify it.

The Court: State what you think is necessary qualification to make your answer true and correct.

The Witness: Ordinarily we send out a form of status report on contracts to the owner or obligor thereupon and those are completed and sent back to us. We might, if that indicated something that called our attention, we might then consult our principal. It would be impractical for a surety company, with the thousands of bonds they write, to consult their principal every time and keep in touch with every contract as it proceeded.

Q. Calling your attention to Plaintiff's Exhibit 3, the document where that exhibit is open shows what?

A. The contract—are you referring to the performance bond, or what part of it?

Q. Is that the performance bond?

(Testimony of Warner M. Bruce.)

A. It looks very much like it.

Q. Well, do you know the gentleman's signature who was authorized by your company to execute it?

A. It is signed by myself. [135]

Q. Signed by you? A. That is right.

Q. And it is attached to and made a part of the contract with Duby, is it not?

A. I think it is.

Q. And under the terms of that performance bond, you agreed to perform the work and be bound by all the conditions that Duby was bound by, didn't you?

A. We agreed—we guaranteed the performance of the contract under the terms of the contract and bond.

Q. Including the provisions of Article 9 of the contract, delays and damages? You stipulated, did you not, that for each calendar day's delay Duby and yourself would be bound to pay the United States \$20 per day?

A. We guaranteed the performance of the contract, whatever its terms may be.

Q. And all of the conditions? You made no exceptions, did you?

A. The form of bond is our guarantee.

Q. And with full knowledge of the fact that this work was to be completed within 30 days, when, in fact, it was not completed for 133 days, do you want the Court to understand that you didn't make any inquiry as to whether it had been completed or not

(Testimony of Warner M. Bruce.)

in the time it was supposed to have been [136] completed?

A. Many times there are conditions which entitle the contractor to an extension, and although these contracts have liquidated damages clauses, my experience has been that in very few cases are they invoked against the contractor. The Government could have held out the money from the estimates and protected themselves and protected the surety, because there were estimates paid a long time after this so-called delay started. That was what we objected to. We had no notice within time in which we could protect ourselves at all, not until a year after the contract had been completed, accepted, a year and a half.

Mr. Belcher: I think that is all.

Redirect Examination

By Mr. Skeel:

Q. As a matter of fact, in Plaintiff's Exhibit 6 you requested the Government to withhold funds, did you not?

A. As early as March, 1945, because of understanding that the contractor was having difficulty in paying his bills and that he was going to be charged with liquidated damages, I requested that it be withheld. The Government made no definite reply to that, but asked me why I wished to have it withheld, and I advised them in the letter which is in evidence and gave them the bills which were outstanding, which were more than the amount of

(Testimony of Warner M. Bruce.)

the bond, and they [137] advised at the time that the contractor had made a request for additional compensation and the matter was being considered, and we had no thought at all that there was any chance of any liquidated damages being imposed upon him under those circumstances.

Mr. Skeel: No further questions.

Recross-Examination

By Mr. Belcher:

Q. You knew, didn't you, that the Government did withhold \$298?

A. I didn't know what they withheld until I got this final claim. I didn't know how much they had paid the contractor. Apparently they paid him money that they should have withheld, if they are claiming liquidated damages.

Q. At the time you wrote this performance bond, had you been fully informed with respect to Exhibit 1, which was the proposal that Duby bid on?

A. We actually never saw the proposal, as we do not see in most instances. However, as you say, we will be charged with knowledge of it, no doubt.

Q. The contract by its terms make the proposal a part of the contract, doesn't it?

A. Very true.

Q. And it is the proposal that fixes the sum of liquidated damages at the rate of \$20 per day for each [138] calendar day's delay?

A. Although I do not believe I had any definite

(Testimony of Warner M. Bruce.)

knowledge at the time of just what the liquidated damages were, I do know that in most of these Government contracts there is some liquidated damages stated; although not acted upon in most instances, they are stated in the contract.

Q. What did you say, "not acted upon in most cases"? A. I mean just that.

Q. How many cases can you tell me where there has been delay where the Government has not insisted upon strict compliance with the conditions of the contract?

A. I couldn't cite you any individual cases, but I know of very few cases where liquidated damages have been charged against a contractor which we had to pay.

Q. Why did you make the statement that the Government didn't insist upon these things in all cases? I asked you for a specific instance.

A. In my opinion, they do not.

Q. I beg your pardon?

A. In my opinion, liquidated damages are not collected in all cases where the contract provides that there could be liquidated damages.

Q. Can you cite me a particular one, a single, solitary instance where you were on the performance bond where the Government did not insist upon the provisions of the [139] liquidated damages clause?

A. I undoubtedly could find plenty in my files, but I can't give you a case here today.

Q. I am not asking you that.

(Testimony of Warner M. Bruce.)

A. No, I can't here today, without my files.

Mr. Belcher: That is all.

The Court: Any further interrogation of this witness?

Mr. Skeel: No, your Honor.

The Court: You may step down. Call the next witness.

Mr. Skeel: Defendant Continental Casualty Company rests.

The Court: Is there any rebuttal?

Mr. Belcher: Yes, your Honor. It will be very short. Mr. Hall.

The Court: Resume the stand, Mr. Hall. You have already been sworn.

LESTER HALL

recalled as a witness by and on behalf of plaintiff, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Belcher:

Q. For the benefit of the Court and counsel, I will ask you to state whether or not this particular project could [140] have been executed under the most favorable conditions without the use of a clam-shell?

A. In my opinion, not.

Q. Could it have been executed by a bulldozer?

A. Not alone, no.

Q. What is meant by the term side casting of material?

(Testimony of Lester Hall.)

A. Well, on this particular job there was——

The Court: Read the question.

(Last question read by reporter.)

The Court: Think of it very carefully.

Q. As applied to this particular job, I will put it that way.

A. The side casting is the picking up of material and casting it to one side or the other of the machine without moving the machine.

Q. Could that be done with a bulldozer?

A. No.

Q. What kind of machine is used?

A. Either a clamshell or a dragline.

Q. What type of equipment did Duby have on this job?

A. He had, I think, a clamshell and possibly a dragline bucket at times, I am not sure.

Q. From the beginning, the inception of the work, or later on?

A. I think he had no equipment on the work for two or [141] three weeks after the work started.

Q. What was he doing?

A. He had a carpenter forming prefabricated forms for the various structures.

Q. That is for what purpose, pouring cement?

A. Yes, pouring concrete.

Q. The big work that was to be done here, Mr. Hall, was the construction of culverts and what?

A. There was one twin box culvert and four

(Testimony of Lester Hall.)

check dams, in addition to cleaning out the stream channel.

Q. What is the purpose of the check dams?

A. It was to slow the velocity of the water up.

Q. So that one bidding upon this job for this construction would know, would he not, that from the very nature of the construction he was going to run into water?

A. Well, the culvert was a twin box culvert with a twin 4 by 7 opening, which accommodates a lot of water.

Mr. Belcher: I think that is all.

Cross-Examination

By Mr. Parrott:

Q. What kind of place was it where this work was being done? Just describe it.

A. It was a stream channel with rather flat surroundings.

Q. When did you first see it?

A. Oh, about 1942. [142]

Q. How did you happen to be out there?

A. I was making a reconnaissance survey for the Civil Aeronautics.

Q. Who decided where this work was going to be done?

A. I don't know. This work was not even contemplated at that time.

Q. When did you see it again after 1942?

A. Off and on.

(Testimony of Lester Hall.)

Q. What would you be down there for?

A. We constructed an open ditch starting in 1943, I believe.

Q. Where was that?

A. This same channel, drainage channel.

Q. You ditched it a little bit, is that what you mean? A. That is right.

Q. How much of a ditch was that?

A. I think it was about a six-foot bottom width and with one to one side slopes, varied in depth from two to six feet.

Q. Six feet on the high side and two feet on the low side, is that what you mean?

A. No, different places on the drainage canal.

Q. Some places it will be a little bit rolling, some places the ditch is two feet deep and some places six feet deep; is that what you mean? [143]

A. That is right.

Q. What time of year was that?

A. I think it was carried on during a good share of the year of 1943.

Q. It took all that summer to do that, did it?

A. That and other work.

Q. Coming up to 1944, when were you first down there in 1944?

A. That I don't recall, either. I was down there periodically.

Q. When do you think you were down there?

A. I was down there at the time that—before the contract for this particular work was let to show bidders over the site. I don't recall the date.

(Testimony of Lester Hall.)

Q. What did the bidders say about the conditions incident to the doing of the work when you took them down there?

A. I don't recall that they said anything.

Q. Isn't it customary when you are showing people over a job like that for the prospective bidders to express their opinion about the terrain and the conditions existing?

A. No, that is strictly forbidden.

Q. You can't talk about it, is that right?

A. That is right.

Q. Who was it made the highest bid, according to the record in the case? [144]

A. That I don't know.

Mr. Belcher: That is immaterial, if your Honor please.

The Court: Overruled.

Q. Who was it made the biggest bid on that job?

A. I don't know.

Q. Will you please look and see?

Mr. Belcher: This witness has testified to nothing of that character on his direct examination, if your Honor please. I submit it is improper cross-examination.

The Court: What is it in direct that opens up this line of inquiry?

Mr. Parrott: I will withdraw the question.

Q. What time was it during the year 1944 that you were down there showing the layout to the bidders?

A. I presume it was August or September.

(Testimony of Lester Hall.)

Q. What were the conditions there at that time as far as the water and terrain were concerned?

A. There was very little water flowing in the channel. The ground conditions were soft and wet in places, mushy.

Q. They would have to sink down how deep, you say, in this ditch? Your testimony was the ground there was comparatively level, but they would have to dig down in the ditch. How deep would they have to dig? A. For what?

Q. In order to put in these frames, etc. [145]

Mr. Belcher: I don't know that there is any testimony on that, if your Honor please, that anybody asked him to dig anywhere. It seems to me this is pretty far afield.

Mr. Parrott: He testified as to the size of a box in his testimony this afternoon, and I want to get some idea of about how deep you had to go down in the dirt, what depth of dirt would you have to remove.

The Court: In order to lay that size box?

Mr. Parrott: That is correct.

Mr. Belcher: He has testified to that, your Honor.

Mr. Parrott: No, he hasn't.

The Court: The objection is overruled. You may answer the question, if you know.

The Witness: I think that about three or four feet in the bottom of the stream channel; on the side, probably seven feet, those parts.

Q. On which side?

(Testimony of Lester Hall.)

A. For parts of the structure would have been out on the banks, would have been about seven feet below the general terrain.

Q. Why couldn't a man do that with a shovel?

A. Because the structures were so small that you couldn't get a shovel in there to do it.

Q. What structure do you mean? [146]

The Court: The structures intended to be built, the concrete structures?

The Witness: Yes.

Q. The concrete wasn't in yet, was it?

A. No, but there was specifications that the concrete structure would be poured against undisturbed earth.

Q. How could you get a clamshell bucket down into a place where a man couldn't get a hand shovel?

A. I thought you were speaking of a power shovel.

Q. No.

A. Yes, this could be excavated with a hand shovel.

Q. The way this situation looked when Mr. Duby made this offer, the way it looked at that time, if it had stayed that way until this contract would have been completed a man could have done that with a hand shovel, couldn't he?

A. That part of the construction, yes, but no sane man would have tried to take and excavate the stream channel with a hand shovel.

Q. Ordinarily, how would you get that out?

A. As I stated before.

(Testimony of Lester Hall.)

Q. How much would it have cost to have diverted the water?

Mr. Belcher: That is immaterial, if your Honor please. I can't see that that has any bearing on this case, how much it would cost to do that.

Q. It would have been practical, would it not, to have [147] diverted the water at that place out of the channel?

Mr. Belcher: That is objected to as immaterial. We are getting far afield.

Mr. Parrott: He said you had to have a clamshell bucket to do that job, and I haven't heard anything in the questions I asked and answers given that indicated you had to have a clamshell.

The Court: The objection is overruled. Read the question.

(Last question read by reporter.)

A. That I don't know. That would take a little study and estimate, I think.

Q. At the time Mr. Duby looked at the terrain, looked the place over, and at the time he made the bid, could you as far as the water that was in evidence there at that time—would it have been any engineering problem to have diverted the water at a very small expense?

Mr. Belcher: That is objected to as immaterial, if you Honor please. Here is a definite, fixed contract. We are trying that, we are not trying the question of the advisability of letting this contract in the first place.

(Testimony of Lester Hall.)

Mr. Parrott: We have been trying this case, as I understand it, on the theory that under the conditions as existed, as Duby had a reasonable right to anticipate [148] they would be, it could be done at a certain cost, a certain kind of equipment, and your position is, according to the testimony of this witness, that it could only be done by heavy equipment like a clamshell bucket or cherrypicker or whatever they call it.

Mr. Belcher: Counsel misunderstood. Mr. Duby distinctly testified—this is rebuttal—Mr. Duby testified that he was forced to go to the additional expense, because of the difficulties which he ran into, of using a clamshell bucket. My purpose here was to rebut that testimony by this witness, that he had a clamshell bucket there at all times.

The Court: The cross-examiner has a right to inquire into the subject matter of the direct examination, no matter whether the direct examination was by way of rebuttal or by way of plaintiff's case in chief, has he not? I do not see that the circumstance of rebuttal limits the right of cross-examination insofar as the cross-examination is already confined to the subject matter inquired of in examination on direct. The objection is overruled. Try not to cover the same ground if you have covered it with this witness when the plaintiff called this witness as part of plaintiff's case in chief. Try not to try the case all over again today to the extent it was tried on April 23rd. [149]

Q. Read the question, please.

(Testimony of Lester Hall.)

(Last question read by reporter.)

The Court: If you know.

A. It wouldn't appear to have been a terrifically expense provision to have made.

Q. What was the ratio of fall per hundred feet of the terrain at that spot?

A. The ratio of—could I have that question again?

Q. The ratio of fall per hundred feet.

A. I don't recall. I think the plans there would show that.

Mr. Parrott: I think that is all.

Mr. Skeel: No questions.

Mr. Belcher: Nothing further.

The Court: You may be excused from the stand. Call the next witness.

Mr. Belcher: The Government rests.

The Court: Is there any further testimony to be taken on behalf of anyone?

Mr. Skeel: No, your Honor.

The Court: Do both defendants rest?

Mr. Parrott: Yes, your Honor.

Mr. Skeel: Defendant Continental rests.

The Court: Court will be at recess for five minutes.

(Recess.) [150]

(Closing arguments made by counsel.)

The Court: The case is continued for two weeks for the purpose of further argument, and in the

meantime I ask all counsel in the case to file briefs touching the points that have been argued today and the questions that have been raised. I wish counsel to show the Court the authorities. It will have to be June 11, at 11 o'clock in the forenoon, and I ask all of you before Friday preceding that date to have on file your briefs in this case, discussing and showing the authorities supporting the various contentions in this case.

Mr. Belcher: Does your Honor desire the entire matter briefed?

The Court: Yes, everything that is to be argued, everything that has any bearing on the question of who should recover and who should not and why.

(At 4:25 o'clock p.m., May 25, 1951, proceedings adjourned until 11:00 o'clock a.m., June 11, 1951.)

June 11, 1951—11:00 A.M.

Mr. Belcher: If your Honor please, I have left with the clerk a certified copy of Exhibit 8, which your Honor [151] rejected because it was on a black background. I have supplied a white background. May I substitute that?

The Court: Is there any objection?

Mr. Skeel: No objection, your Honor.

The Court: It was received in evidence as Plaintiff's Exhibit 8.

Mr. Belcher: Yes, your Honor.

The Court: You now ask that this white background be substituted?

Mr. Belcher: Yes, your Honor.

The Court: That request is granted. It is so ordered, and the original paper initially marked Exhibit 8 will now be returned to counsel who offered it.

Mr. Belcher: For the purpose of clarity, may that be marked Exhibit 8? I have referred to it all the way through my brief as Exhibit 8. That is the way it was originally offered, your Honor.

The Court: Is there any objection to counsel's request from opposing counsel?

Mr. Skeel: No, your Honor.

The Court: That request is granted, and the Court's previous notation and order that the offer of that exhibit was denied because it was presented in the form of a black photostat, and the Court's order withdrawing that exhibit and returning it to counsel who produced it, are [152] each and all stricken and the Court does now order that the clerk receive the substituted white background copy of what was that identified exhibit, and the Court directs the clerk to place on this white background copy the notation Plaintiff's Exhibit 8 and the Court does now admit that exhibit in evidence as Plaintiff's Exhibit 8. Does that take care of it?

Mr. Belcher: Yes, your Honor, thank you.

(Plaintiff's Exhibit 8 received in evidence.)

(Arguments made by counsel.)

Court's Decision

The Court: It is the opinion and decision of the Court that the claim sued for by the plaintiff is for liquidated damages and not a penalty; that the claim is one which is provable in bankruptcy.

That the discharge of the defendant Duby in bankruptcy was a discharge of the Government's claim direct against him, and for that reason the defendant Duby is not now liable to the plaintiff in any sum—because whatever claim the Government had against the defendant Duby was discharged by the discharge in his bankruptcy proceeding.

That as to the defendant Continental [153] Casualty Company, that defendant did have a contract obligation to indemnify the plaintiff against the nonpayment by the defendant Duby of such claim for liquidated damages, but that such defendant's third affirmative defense pleaded in paragraph I on page 5 of its answer under the evidence of this case is a complete defense against the plaintiff's asserted claim for such indemnity obligation of the defendant surety company, because the Court finds, concludes and decides that the evidence in this case establishes, by a preponderance thereof, that all the while the United States Government was claiming a breach of contract by the defendant Duby, and without notifying the defendant Continental Casualty Company, the surety, of such breach or delay, the plaintiff continued after such alleged breach to make progress payments to the defendant Duby of the moneys earned under the contract and which

were in the hands of the plaintiff, and that by reason of the making by plaintiff of such progress payments, the plaintiff gave up the security which it then had against the defendant Duby which the plaintiff could have applied on account of any liquidated damage claim which then was accruing or which thereafter did accrue, and that by reason thereof the defendant Continental Casualty Company was released from its indemnity contract obligation to the plaintiff. [154]

That in view of all the evidence in this case and from a preponderance thereof, the Court finds, concludes and decides that the plaintiff take nothing against either of these defendants on account of plaintiff's complaint herein, and that plaintiff's complaint be dismissed without costs, and that each party litigant pay its own costs herein [155] sustained.

Certificate

I, Patricia Stewart, do hereby certify that I am official court reporter for the above-entitled court, and as such was in attendance upon the hearing of the foregoing matter.

I further certify that the above transcript is a true and correct record of the matters as therein set forth.

/s/ PATRICIA STEWART,
Official Court Reporter.

[Endorsed]: Filed October 15, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision I of Rule 11 as Amended of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure, I am transmitting herewith all of the original papers in the file dealing with the above-entitled action, and that the same constitute the complete record on file in said cause. The papers herewith transmitted, together with Plaintiff's Exhibits numbered 1 to 18 inclusive, and Defendants' Exhibits numbered A-1 to A-3 inclusive, constitute the record on appeal from the Judgment of Dismissal Filed July 16, 1951, to the United States Court of Appeals for the Ninth Circuit, and are identified as follows:

1. Complaint, filed Mar. 15, 1949.
2. Praecept for summons, filed Mar. 15, 1949.
3. Marshal's Return on Summons, Duby, filed Mar. 25, 1949.
4. Appearance, Deft. Continental Cas. Co., filed April 4, 1949.
5. Marshal's Return on Summons, Con. Cas. Co., filed May 3, 1949.
6. Answer of Defendant, Continental Casualty Co., filed July 12, 1950.

7. Answer and Affirmative Defenses of Pat Duby, filed July 14, 1950.
8. Answer of Pat Duby to Cross-Complaint of Con. Cas. Co., filed July 20, 1950.
9. Reply of Plaintiff to Answer of Pat Duby, filed Aug. 17, 1950.
10. Reply to Answer of Continental Cas. Co., filed Aug. 17, 1950.
11. Motion Con. Cas. Co. to Require Plaintiff to Produce Documents, filed April 12, 1951.
12. Notice of Hearing Motion, filed April 12, 1951.
13. Praecept for Subpoena, (Hall), behalf Government, filed April 20, 1951.
14. Marshal's Return on subpoena, Hall, filed April 23, 1951.
15. Memorandum of Authorities of Con. Cas. Co., filed May 25, 1951.
16. Memorandum on Behalf of Defendant Duby, filed May 25, 1951.
17. Memorandum Submitted by Defendant Pat Duby, filed June 6, 1951.
18. Supplemental Memorandum of Authorities of Con. Cas. Co., filed June 7, 1951.
19. Plaintiff's Memorandum, filed June 8, 1951.
20. Findings of Fact and Conclusions of Law, filed July 16, 1951.
21. Judgment of Dismissal, filed July 16, 1951.
22. Notice of Appeal, filed Sept. 11, 1951.
23. Court Reporter's Transcript of Proceedings at Trial, filed Oct. 15, 1951.
24. Order to Transmit all Exhibits to Court of Appeals, filed Oct. 15, 1951.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for preparation of the record on appeal herein on behalf of appellant, to-wit: **Filing fee, Notice of Appeal, \$5.00**, and that this amount has not been paid to me for the reason that the appeal in this cause is being prosecuted by the United States Government.

In Witness Whereof I have hereunto set my hand
and affixed the official seal of said District Court at
Seattle, this 16th day of October, 1951.

[Seal] MILLARD P. THOMAS,
Clerk,

By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 13138. United States Court of Appeals for the Ninth Circuit, United States of America, Appellant, vs. Pat Duby, Doing Business as Pat Duby Company and Continental Casualty Company, a Corporation, Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed October 18, 1951.

[Seal] /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 13138

UNITED STATES OF AMERICA,

Appellant,

vs.

PAT DUBY, Doing Business as Pat Duby Com-
pany,

Defendant,

CONTINENTAL CASUALTY COMPANY, a Cor-
poration,

Defendant Respondent.

CONCISE STATEMENT OF POINTS ON
WHICH APPELLANT INTENDS TO RELY
AND DESIGNATION OF RECORD TO BE
PRINTED

Comes now appellant United States of America and submits the following concise statement of points on which appellant intends to rely on this appeal.

I.

This appeal is from the judgment of dismissal rendered in favor of respondent Continental Casualty Company only, as surety upon the performance bond of Pat Duby Company. No relief is intended to be sought or will be sought from the defendant Pat Duby, d/b/a Pat Duby Company.

II.

The errors relied upon by appellant are:

- (a) Finding of Fact numbered XIII to the effect *to the effect* that respondent Continental Casualty Company had no notice of appellant's (plaintiff's) claim for liquidated damages resulting from delay in the performance of the contract by said Duby until receipt of letter dated September 11, 1946, from the General Accounting Office of the United States.
- (b) Conclusion of Law numbered IV, holding defendant (respondent) Continental Casualty Company is entitled to a judgment of dismissal, based upon evidence produced at the trial which constitutes a complete defense under its Third Affirmative defense.

Appellant hereby adopts its designation as filed in the District Court; designates the following from the record to be printed in the transcript:

1. The entire transcript of the proceedings.
2. All of the pleadings.
3. The Findings of Fact, Conclusions of Law and Judgment of dismissal.
4. Notice of appeal.

5. This designation.
6. Certificate of clerk.

/s/ **J. CHARLES DENNIS,**
United States Attorney.

/s/ **JOHN E. BELCHER,**
Assistant U. S. Attorney.

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN,

/s/ **WILLARD E. SKEEL,**
Attorneys for Continental
Casualty Co.

Receipt of copy acknowledged.

[Endorsed]: Filed November 1, 1951.